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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney

Petitioners,

-v-

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit err by holding that, on an otherwise proper interlocutory appeal, the jurisdictional question of standing was not properly before the court?

PARTIES

The names of the parties to the proceedings in the court below appear in the caption of this case.*

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*None of the petitioners is a corporation. See Rule 29.6.

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OPINIONS BELOW

The opinion of the court of appeals is reported as Summit Medical Associates v. Pryor, 180 F.3d 1326 (11th Cir. 1999) (App. A). The opinion of the district court is reported as Summit Medical Associates, P.C. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998) (App. B). After the notice of appeal was filed, the district court issued a stay of its proceedings pending resolution of this appeal, and an extensive opinion by the district court related to the issuance of the stay is reported as Summit Medical Associates, v. James, 998 F. Supp. 1339 (M.D. Ala. 1998) (App. C).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued the decision for which petitioners seek review on July 15, 1999 (App. A). The Court of Appeals entered an order denying rehearing and rehearing en banc on September 22, 1999 (App. D). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of Article III, Section 2, of the United States Constitution is set forth in Appendix F. The text of 28 U.S.C. § 1291 is set forth in Appendix G.

STATEMENT OF THE CASE

A. The District Court

The case began with a complaint filed in the U.S. District Court for the Middle District of Alabama in July 1997, before two abortion statutes became operational. The first statute proscribes a procedure known as "partial birth abortion." The second statute criminalizes abortions done on viable unborn children. In general, the Complaint alleges that the statutes are too vague to be enforced. App. 10a.

On the day that the partial birth abortion statute was due to become operative, the Attorney General limited the circumstances under which a criminal prosecution may occur. He did so by letter to the district attorneys in the State's four largest counties: Jefferson, Madison, Mobile and Montgomery. In his letter, the Attorney General directed the district attorneys not to prosecute unless the fetal child was viable. App. 4a.

From the effective date of the partial birth abortion statute until the present, the Attorney General is not aware of any complaints of violations of either statute. There are no investigations, no threatened prosecutions, and no pending prosecutions. There are no known facts under which a prosecution or investigation could proceed at this point under either statute. App. 74a.

The respondents (plaintiffs below) are three abortion providers and one physician. None of the respondents allege an intention or a desire to perform abortions on viable unborn children. The partial birth statute provides for criminal penalties only against "physicians." The statute barring post-viability abortions provides for criminal penalties against "any person." App. 63a.

The Attorney General filed a motion to dismiss and asserted that the Complaint should be barred under the Eleventh Amendment and that there was no Article III case or controversy, particularly because of a lack of standing.[1]

On the Eleventh Amendment issue, the District Court

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[1]The Fourth Circuit, in Richmond Medical Center For Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998), a case involving substantially similar facts, held that plaintiffs who did not perform the kinds of abortions prohibited by Virginia's statute prohibiting partial birth abortions did not face reasonable fear of prosecution and thus lacked standing to challenge the statute.

viewed the case as a "prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law." App. ____. It rejected the view that, in addition to seeking prospective relief, the plaintiffs must allege "an ongoing violation of federal law. . . ." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2046 (1997) (O'Connor, J., concurring in part and concurring in judgment). App. 46a-54a.

In the same order, the District Court also ruled that an Article III case or controversy existed. It refused to dismiss the action for lack of standing, as it said that a credible threat of prosecution existed.

B. The Eleventh Circuit

The petitioners (hereafter, "Attorney General") appealed from the refusal to dismiss the case on Eleventh Amendment immunity grounds. In that appeal, he urged that the District Court should have dismissed the complaint not only on Eleventh Amendment grounds, but also on the ground that the action did not satisfy the case or controversy requirements of Article III, particularly standing. The Court of Appeals was urged to address both of these questions. App. 12a.

The Court of Appeals ruled that the appeal was proper pursuant to 28 U.S.C. § 1291, as it plainly involved a refusal to dismiss on Eleventh Amendment immunity grounds. App. 12a (citing Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)). The court noted that the appealability of a denial of a motion to dismiss on sovereign immunity grounds stems from the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). App. 12a.

When it came to reviewing the District Court's refusal to dismiss for want of standing, the Court of Appeals noted

that justiciability issues are not, in and of themselves, immediately appealable as of right under the collateral order doctrine. App. 13a. The Court of Appeals declined to consider the standing question "as part of a federal court's obligation to satisfy itself that a matter is justiciable." App. 13a-16a. It regarded the reviewability question as controlled by circuit precedent on the doctrine of pendent appellate jurisdiction interpreting this Court's decision in Swint v. Chambers County Commission, 514 U.S. 35, 51 (1995). App. 14a-16a. Thus, the Court of Appeals held that it could rule on the issue of standing only "if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other." Id. The Court of Appeals held that the immunity issue giving rise to the interlocutory appeal could be "resolved" without reaching the questions about standing and, therefore, no responsibility to consider standing existed. App. 15a-16a.

On the merits of the Eleventh Amendment issue, the Court of Appeals ruled that sovereign immunity did not bar the plaintiffs' claims for declaratory relief against the Attorney General, insofar as they related to the criminal penalties. The Ex parte Young exception was deemed controlling. App. 27a-28a. However, the court concluded that Ex parte Young did not authorize the District Court to address claims against the Attorney General about the private civil damages provisions of the partial birth abortion statute, as he lacked any authority to seek damages. App. 27a-28a.

The Court of Appeals therefore affirmed the District Court in part and reversed in part. It remanded with instructions to the District Court to dismiss the challenge to the private civil enforcement provision of the partial-birth abortion statute, but expressly declined "to exercise our pendent appellate jurisdiction over the question of standing." App. 28a.

REASONS FOR GRANTING THE WRIT

Standing, as a jurisdictional question, is always an issue properly before the court, regardless of the stage of proceedings or the posture of the litigation. The court below disregarded this fundamental precept.

This Court should grant review to correct the Eleventh Circuit's departure from clearly established principles governing the "limits on federal judicial power in our system of government." Allen v. Wright, 468 U.S. 737, 750 (1984). In remanding this case to the district court in the face of a strong showing by petitioners that the respondents lacked standing, the Eleventh Circuit ignored what this Court has called "perhaps the most important of [the jurisdictional] doctrines," Allen, 468 U.S. at 751, the application of which in a given case is not a matter of discretion but "an independent obligation," id., to answer the question of whether the litigant is entitled to litigate at all. More than the obvious considerations of judicial economy and the right to be free from groundless claims are at stake here. This Court has said that "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Id. at 750. Indeed, when a court decides an issue without first assuring itself of its subject matter jurisdiction, the court impermissibly declares its willingness to offer an advisory opinion.

Given the paramount importance of the case or controversy requirement within the overall scheme of limited government, the Eleventh Circuit's refusal to discharge its obligation to address the standing issue in this case should not be permitted to stand. The practice in the lower courts, moreover, is divided, indeed badly confused, requiring this Court's definitive intervention.

This Court should grant review, or summary reversal of the decision below.

I. THE DECISION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.

This Court has repeatedly held that the requirement that jurisdiction be established as a threshold matter derives "from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, ----, 118 S. Ct. 1003, 1012-13 (1998), quoting Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884). The federal courts are "under an independent obligation to examine their own jurisdiction." FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). This obligation applies even when the parties concede jurisdiction and make no contention concerning it. Id. at 231, citing Mitchell v. Maurer, 293 U.S. 237, 244 (1934), and Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). As this Court said in Bender:

> . . . every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.

Id. (citations omitted). This obligation attaches at all stages of the litigation. Id. at 547.[2]

Of particular relevance is this Court's decision in Calderon v. Ashmus, 522 U.S. 740, 118 S. Ct. 1694, 1697 (1998). Calderon was an appeal by the State of California from a district court judgment granting a preliminary injunction

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[2]See also, this Court's November 19, 1999 Order in Pending Case, directing the parties to file supplemental briefs on the issue of Article III standing in Vermont Agency of Natural Resources v. U.S., ex rel. Stevens, 1999 WL 1045146 (U.S.), to be reported at 120 S. Ct. 523.

against any attempt by the state to enforce the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). The Ninth Circuit reviewed the matter on an interlocutory basis pursuant to 28 U.S.C. § 1292(a)(1) and, in the course of its review, determined that the plaintiff had demonstrated that an actual case or controversy existed. Ashmus v. Calderon, 123 F.3d 1199, 1207 (9th Cir. 1997).

This Court granted certiorari to review the Eleventh and First Amendment issues raised by the petitioners. Calderon, 522 U.S. ----, 118 S. Ct. 596 (1997). The Court began its review by stating that: "in keeping with our precedents, [we] have decided that we must first address whether this action for a declaratory judgment is the sort of 'Article III' case or controversy to which federal courts are limited." Calderon, 118 S. Ct. at 1697. Having determined that the matter was not a justiciable case within the meaning of Article III, this Court reversed the judgment of the court of appeals and remanded with instructions to dismiss respondent's complaint.

This Court has never deviated from the position that the establishment of jurisdiction is a threshold requirement in every case that comes before a federal court. The Eleventh Circuit in this case, however, relied upon this Court's decision in Swint v. Chambers County Comm'n, 514 U.S. 35 (1995), as support for its position that it could not review standing on an interlocutory appeal under its pendent appellate jurisdiction. App. 14a-16a. In light of this Court's precedents, however, it is clear that the Eleventh Circuit is in error on this point. Swint involved the propriety of pendent appellate jurisdiction over a different party raising nonjurisdictional issues; to read Swint as precluding review of court's jurisdiction when a party raises those objections in a case properly on appeal would create mischief and contradict prior Supreme Court standing cases.

Swint arose out of a series of police raids on a nightclub in Chambers County, Alabama. The club's owners, an

employee, and a patron sued the county commission, the city, and three individual police officers pursuant to 42 U.S.C. § 1983 for alleged civil rights violations. All five defendants moved for summary judgment, the individuals on the grounds of qualified immunity, the city and the county commission on the grounds that their agents who participated in the raids were not policy-making employees whose acts could render those entities liable. Id. at 38-40. The district court denied all of the motions.

Invoking the principle of Mitchell v. Forsyth, 472 U.S. 511, 530 (1985), the individual defendants filed an interlocutory appeal of the denial of their qualified immunity motions. The city and the county commission also appealed, arguing that the denial of their summary judgment motions was also immediately appealable as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949), or, in the alternative, pursuant to the court of appeals' doctrine of "pendent appellate jurisdiction." Swint, 514 U.S. at 40. The Eleventh Circuit did exercise pendent appellate jurisdiction over the county commission's appeal and reversed the district court's order denying summary judgment.

In vacating the Eleventh Circuit's decision in Swint, this Court held that the court of appeals improperly exercised pendent appellate jurisdiction over the motion of the county commission. The Court stressed the limited nature of such jurisdiction and the need for courts to stay within the boundaries set by Congress to control the timing of appellate proceedings. Id. at 45-46. The Court emphasized the distinction between an official's qualified immunity defense and the kind of defense being asserted by the county commission. Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. at 42, quoting Mitchell, 472 U.S. at 526. This Court found that the county commission's defense was a "mere defense to liability" and thus not an appealable collateral order. Swint, 514 U.S. at 43.

In Swint, this Court declined to definitely settle the limits of pendent appellate jurisdiction, but endorsed an approach used by several courts of appeals,[3] namely, that pendent appellate jurisdiction should only be applied to non-appealable issues which are "inextricably intertwined" with appealable issues or where review of the former issues is necessary to ensure meaningful review of the latter. Id. at 51. But nothing in Swint suggests that this Court intended to abandon its long standing doctrine regarding the threshold nature of standing in every federal case. Yet that is how the Eleventh Circuit erroneously applied Swint in the case at bar, stating that: "we may exercise jurisdiction over standing only if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other." App. 14a.

The source of the Eleventh Circuit's error is that court's failure to appreciate that standing is no "mere defense to liability," but, as has been shown, a threshold requirement, a sine qua non of Article III justiciability which must be met in every case at every level of the federal court system. Put another way, the issue of standing most certainly is "inextricably intertwined" with every and any issue which properly comes before a court of appeals, and the determination of the standing issue is an absolutely essential prerequisite to the resolution of all other issues.[4]

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[3]See, e.g., Golino v. New Haven, 950 F.2d 864, 868-69 (2d Cir. 1991); National Union Fire Ins. Co. v. City Savings, F.S.B., 28 F.3d 376, 382 (3d Cir. 1994); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1374 (10th Cir. 1991).

[4]This principle is so basic that the decisions of this Court simply assume that, once interlocutory appellate jurisdiction is established, underlying justiciability issues are open for review. E.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (appeal of civil contempt order used as vehicle to attack plaintiffs' standing); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (appeal of preliminary injunction used

In sum, a reviewing court must address whether Article III jurisdiction exists regardless of the basis for appellate jurisdiction. The Eleventh Circuit's holding that it may ignore the standing issue merits plenary review in this Court, or summary reversal of the decision below.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT AND OTHER FEDERAL COURTS.

The Eleventh Circuit's refusal to determine the question of standing in this case conflicts squarely with a decision of the Fifth Circuit. In U.S. v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999), the Fifth Circuit decided a case brought against a state university under the False Claims Act, 31 U.S.C. § 3729, et. seq. The defendants moved for dismissal claiming immunity under the Eleventh Amendment. The district court denied the motion and the defendants filed an interlocutory appeal pursuant to this Court's holding in Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) ("States and state entities . . . may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

In direct contrast with the Eleventh Circuit's approach in the case below, the Fifth Circuit in Texas Tech University recognized its obligation to first determine whether or not the plaintiff had Article III standing. U.S. v. Texas Tech University, 171 F.3d at 288 n.12. This obligation applied even though none of the parties had challenged plaintiff's standing. Id. ("No one has challenged [plaintiff] Fould's standing in this case. We must, however, consider possible objections to standing sua sponte").

The obligation of the federal courts to resolve

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as vehicle for review of standing).

jurisdictional issues as a threshold matter even on interlocutory appeal was recognized by the Eleventh Circuit itself in a case decided shortly before the case below. In Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212 (11th Cir. 1999),[5] the court considered an interlocutory appeal of a district court's denial of defendants' motions to dismiss a complaint on grounds of lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. The Eleventh Circuit held that it had jurisdiction to decide the issues of subject matter jurisdiction and sovereign immunity, but declined to exercise pendent appellate jurisdiction over the failure to state a claim issue. Id. at 1220-22. With regard to subject matter jurisdiction, the court said: "As a threshold matter, we have a special obligation to satisfy ourselves not only that we have jurisdiction over this appeal, but also that the district court had jurisdiction over the various counts of Tamiami's complaint." Id. at 1221. The court noted: "This obligation applies to every appeal; it is 'inflexible and without exception.'" Id.

The Sixth Circuit case of Children's Healthcare Is A Legal Duty, Inc. v. Deters, 92 F.3d 1412 (6th Cir. 1996), involved a civil rights action challenging the constitutionality of a statute which provided exceptions from prosecution for those who fail to provide adequate medical care for children. The defendants, the attorney general of Ohio and county prosecutors, unsuccessfully sought dismiss for Eleventh Amendment immunity and lack of standing.

The Sixth Circuit reversed on the Eleventh Amendment issue, with Judge Batchelder writing separately to explain why, in her view, the court should have addressed the issue of standing even though it had not been raised by any of the parties on appeal. Children's Healthcare, 92 F.3d at 1412-25:

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[5]The Tamiami case was decided on June 7, 1999. The opinion in the case at bar was rendered on July 15, 1999. App. 1a.

> when an appellant properly appeals another issue, the issue of standing comes before us as well. Constitutional standing is always a threshold inquiry for us to make before asserting jurisdiction over an appeal.

Id. at 1419 (citations omitted).

Contrary to the foregoing are cases decided by the Second and Seventh Circuits. Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993) (holding that standing is not appealable immediately under collateral order doctrine); City of Detroit v. Grinnell Corp., 495 F.2d 448, 474-75 (2d Cir. 1974) (refusing to review standing question on interlocutory appeal because resolution of issue was merely a "'step[ ] towards final judgment in which [it] will merge'") (citation omitted)).

In view of this lack of uniformity in applying a fundamental rule of law, this Court should intervene to confirm, especially in light of any confusion arising from a misreading of Swint, that Article III standing is always an issue in every proceeding and at every stage including interlocutory appeals.

CONCLUSION

The Eleventh Circuit's departure from settled law in this case is more than a mere misapplication of a properly stated rule of law. It betrays, rather, a fundamental failure to understand the proper role of the federal courts in our constitutional system.

This Court should grant the petition for a writ of certiorari.

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December 20, 1999.

APPENDICES

APPENDIX A

SUMMIT MEDICAL ASSOCIATES, P.C., William Knorr, M.D., et al., on behalf of themselves and their patients seeking abortions, Plaintiffs-Appellees,

v.

Bill PRYOR, in his official capacity as Attorney General and his agents and successors, and Ellen Brooks, in her official capacity as Montgomery District

Attorney, etc., Defendants-Appellants.

No. 98-6129.

United States Court of Appeals,

Eleventh Circuit.

July 15, 1999.

The central issue raised in this interlocutory appeal is whether Alabama's Eleventh Amendment sovereign immunity bars this suit in federal court against the Governor, the Attorney General, and the District Attorney challenging the Alabama Partial-Birth Abortion Ban Act of 1997 ("partial-birth abortion statute") and the Abortion of Viable Unborn Child Act ("post-viability abortion statute"). We hold that Appellees' challenge to the statutes' criminal liability provisions falls squarely within the exception to the Eleventh Amendment embodied in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and, therefore, that the district court did not err in denying Appellants' motion to dismiss this § 1983 action on these grounds. However, with respect to Appellees' challenge to the private civil enforcement provision embodied in the partial-birth abortion statute, we conclude that, because Appellants have no enforcement authority over those specific provisions, the Ex parte Young exception does not apply, and Alabama's sovereign immunity

bars this specific claim. Accordingly, we affirm in part, reverse in part, and remand this case with instructions to the district court to dismiss Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute.

I.

Appellees are three corporations that own abortion clinics, Summit Medical Association, P.C., Beacon Women's Center, and New Woman, All Women Health Care, and one physician, William H. Knorr, M.D. They initiated this action on July 24, 1997, in the United States District Court for the Middle District of Alabama against Fob James, Jr., then Governor of Alabama, Bill Pryor, Attorney General of Alabama, and Ellen Brooks, Montgomery District Attorney, alleging that the Alabama Partial-Birth Abortion Ban Act of 1997, Ala.Code §§ 26- 23-1 to -6 (Supp.1998), and the Abortion of Viable Unborn Child Act, Ala.Code §§ 26-22-1 to -5 (Supp.1998), violate the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983 (1994). They sought injunctive and declaratory relief.[1]

In 1997, the Alabama state legislature enacted these statutes to impose criminal and civil penalties on the performance of certain types of abortion procedures. The partial-birth abortion statute prohibits any physician from "knowingly" performing a "partial-birth abortion,"[2] Ala.Code

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[1]The effective dates of these statutes were August 1, 1997 and August 12, 1997, respectively. Therefore, at the time of the filing of this action, neither statute had taken effect.

[2]In full, the partial-birth abortion statute provides:

§ 26-23-1. Title.

This chapter may be cited as the "Alabama Partial-Birth Abortion Ban Act of 1997."

§ 26-23-2. Definitions.

As used in this chapter, the following terms shall have the following meanings:

(1) FATHER. The biological father of the human fetus.

(2) MOTHER. The female who is pregnant with a live human fetus which may be subject to a partial-birth abortion under this chapter.

(3) PARTIAL-BIRTH ABORTION. An abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(4) PHYSICIAN. A doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state or any other individual legally authorized by the state to perform abortions. This definition shall also include any individual who is not a physician or is not otherwise legally authorized by the state to perform abortions, but who nevertheless performs a partial-birth abortion.

§ 26-23-3. Physician; prohibited action.

Any physician who knowingly performs a partial-birth abortion within this state and thereby kills a human fetus shall be guilty of a Class C felony and upon conviction thereof shall be punished as prescribed by law.

§ 26-23-4. Exception; life of the mother.

Section 26-23-3 shall not apply to a partial-birth abortion that is necessary to save the life of a mother.

§ 26-23-5. Relief; father and maternal grandparents.

The father, if married to the mother at the time she receives a partial- birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall be limited to monetary compensation for all injuries, psychological and physical, occasioned by a violation under this chapter and monetary punitive compensation as allowed by law.

§ 26-23-6. Woman; prosecution.

A woman upon whom a partial-birth abortion is performed may not be prosecuted under this chapter for a conspiracy to violate

§ 26-23-3, defined as "[a]n abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," id. § 26-23-2(3). The performance of such an abortion constitutes a Class C felony, punishable by a fine of not more than $5000 and imprisonment for up to ten years, and triggers the possibility of license revocation under Alabama law. See id. § 26-23-3; see also Ala.Code §§ 13A-5-2, -6(a)(3), -11(a)(3) (1994); Ala.Code § 34-24- 360(4) (1997). Under the statute's private civil enforcement provision, the performing physician also may be liable in a civil suit to the "father" of the fetus, if he is married to the woman who underwent the abortion, or to the "maternal grandparents" of the fetus, if the woman is a minor at the time of the procedure. Ala.Code § 26-23-5. However, where the abortion "is necessary to save the life of the mother" the statute bars criminal and civil liability. Id. § 26-23-4.

On August 1, 1997, the effective date of the partial-birth abortion statute, the Alabama Attorney General sent letters to four Alabama district attorneys instructing them on his interpretation of the new statute.[3] The letters stated that for the purpose of prosecutions brought under the act, "a physician partially delivers a living fetus before killing the fetus [as proscribed by the act] when the physician deliberately and intentionally delivers into the vagina a viable fetus, or a substantial portion of the viable fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."

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this chapter or for any other offense which is unlawful under this chapter.

Ala.Code. §§ 26-23-1 to -6.

[3]The Attorney General stated that these instructions were given pursuant to Ala.Code § 36-15-14 (1991), which provides in relevant part: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of any criminal case in any of the courts of this state."

The post-viability abortion statute, on the other hand, prohibits any person from "intentionally, knowingly, or recklessly" performing or inducing any type of abortion "when the unborn child is viable."[4] Ala.Code § 26-22-3(a). "Viable

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[4]In its entirety, the post-viability abortion statute provides:

§ 26-22-1. Legislative findings and intent.

(a) The public policy of the State of Alabama is to protect life, born and unborn. This is particularly true concerning unborn life that is capable of living outside the womb. The Legislature of the State of Alabama finds there are abortions being done in Alabama after the time of viability and in violation of its public policy.

(b) The Legislature specifically finds the following:

(1) Medical evidence shows there is a survival rate of babies born between ages 23 weeks to 29 weeks gestational age of 64 percent to 94 percent.

(2) In Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the United States Supreme Court determined that viability may occur as early as 23 to 24 weeks gestational age. Also, the United States Supreme Court determined that requiring fetal viability testing at 20 weeks gestational age is constitutional, because there is up to a four week margin of error in determining gestational age.

(3) In the latest year of Alabama statistical reporting, 1994, there were reported to be 182 abortions performed at 20 or more weeks gestational age. There were also 70 abortions performed where no gestational age was stated.

(c) Subject to life and health exceptions to the mother, it is the intent of the Legislature to ban abortions of any unborn child that is capable of living outside the womb. To permit otherwise is a wanton disregard of human life.

§ 26-22-2. Definitions.

The following words shall have the following meanings:

(1) ABORTION. The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood,

cause the death of the unborn child.

(2) FERTILIZATION. The fusion of a human spermatozoon with a human ovum.

(3) GESTATIONAL AGE. The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

(4) HOSPITAL. An institution licensed pursuant to the provisions of the law of this state.

(5) LIVE BIRTH. When used with regard to a human being, means that the human being was completely expelled or extracted from his or her mother and after such separation, breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles, or any brain-wave activity.

(6) MEDICAL EMERGENCY. The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(7) PREGNANT. The female reproductive condition of having a developing fetus in the body and commences with fertilization.

(8) UNBORN CHILD AND FETUS. An individual organism of the species homo sapiens from fertilization until live birth.

(9) VIABLE AND VIABILITY. The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§ 26-22-3. Prohibition–Exceptions--Regulations--Penalties.

(a) Prohibition. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.

(b) Exceptions.

(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in the substantial and irreversible impairment of a major bodily function.

(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable.

(c) Abortion regulated. Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:

(1) The physician performing the abortion certifies in writing that, based upon his or her medical examination of the pregnant woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or serious risk of substantial and irreversible impairment of a major bodily function.

(2) The physician's judgment with respect to the necessity for the abortion has been concurred in by one other licensed physician who certifies in writing that, based upon his or her separate personal medical examination of the pregnant wom

an and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman.

(3) The abortion is performed in a hospital.

(4) The physician terminates the pregnancy in a manner

which provides the best opportunity for the unborn child to survive, unless the physician determines, in his or her good faith medical judgment, that termination of the pregnancy in that manner poses a significantly greater risk either of the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman than would other available methods.

(5) The physician performing the abortion arranges for the attendance, in the same room in which the abortion is to be completed, of a second physician who shall take control of the child immediately after complete extraction from the mother and shall provide immediate medical care for the child, taking all reasonable steps necessary to preserve the child's life and health.

(d) Penalty. Any person who violates subsection (a) commits a Class A felony. Any person who violates subsection (c) commits a Class C felony.

§ 26-22-4. Viability testing.

Except in the case of a medical emergency, prior to performing an abortion upon a woman subsequent to her first 19 weeks of pregnancy, the physician shall determine whether, in his or her good faith medical judgment, the child is viable. When the physician has determined that a child is viable, he or she shall report the basis for his or her determination that the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. When the physician has determined that a child is not viable after the first 19 weeks of pregnancy, he or she shall report the basis for such determination.

§ 26-22-5. Construction.

Nothing in this chapter shall be construed to recognize a right to abortion or to make legal an abortion that is otherwise unlawful.

Ala.Code §§ 26-22-1 to -5.

The statute also contained the following severability provision:

If any provision, word, phrase, or clause of this act, or the application thereof, to any person, entity, or circumstance shall be

and viability" are defined in the statute as follows:

> The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

Id. § 26-22-2(9) (emphasis added). After the nineteenth week of pregnancy, the statute requires all physicians performing abortions to make a good-faith medical judgment as to whether the fetus is viable. See id. §§ 26-22- 2(9), -4.

Under the post-viability abortion statute, a person who intentionally, knowingly, or recklessly performs or induces a post-viability abortion has committed a Class A felony, punishable by imprisonment from ten to ninety-nine years and fines up to $20,000. See id. § 26-22-3(a), (d); see also Ala.Code §§ 13A-5-2, -6(a)(1),--11(a)(1). A physician may perform a post-viability abortion if he or she "reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman." Ala.Code § 26-22-3(b)(1). Under these circumstances, a physician must satisfy five additional procedural requirements, including written certification of the physician's judgment, written concurrence of another licensed physician, and performance of all reasonable steps necessary to preserve the life and health of the unborn child. See id. § 26-22-3(c)(1) to (5). Failure to comply with these requirements constitutes a Class C felony, punishable by imprisonment from one year and one day to ten years and fines up to

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held invalid, such invalidity shall not affect the remaining provisions, words, phrases, clauses, or application of this act, which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end, the provisions, words, phrases, and clauses of this act are declared to be severable.

Act of May 14, 1997, § 6, 1997 Ala. Acts 97-442.

$5000. See id. § 26-22-3(d). These requirements are waived, however, where the physician, in his or her reasonable medical judgment, determines that the nature of the medical emergency prevents compliance. See id. § 26-22-3(c).

Appellees allege that these statutes are unconstitutionally vague and can be construed to prohibit abortions performed in the first trimester of pregnancy, thus imposing an undue burden on the right of patients to seek abortions free from government interference.[5] Moreover, Appellees contend that the post-viability abortion statute imposes a further undue burden because it does not provide adequate safeguards for protecting a patient's health. Appellees also challenge the partial-birth abortion statute's private civil enforcement provision on the ground that it unduly burdens patients' rights to obtain abortions without government interference.

On September 4, 1997, Attorney General Pryor and District Attorney Brooks ("Appellants") filed a motion to dismiss alleging lack of standing, Eleventh Amendment immunity, and failure to state a claim on the merits. Governor James also moved to dismiss for lack of subject matter jurisdiction. On November 24, 1997, the district court held a hearing on these motions.

Thereafter, on January 26, 1998, the district court issued an order and a lengthy memorandum opinion denying

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[5]All Appellees perform abortions through the thirteenth week from the woman's last menstrual period ("LMP"). They allege that these abortions may fall within the proscription of the partial-birth abortion statute, and that they intend to continue to perform such abortions despite the existence of the statute. Appellees Summit Medical and Dr. Knorr perform abortions through twenty-four and a half weeks LMP. Similarly, they allege that these abortions may fall within the proscription of the post-viability abortion statute, and that they intend to continue performing such abortions despite the existence of the statute. As a consequence of these intentions, all Appellees allege that they fear prosecution under either or both statutes.

the Governor's motion and granting in part, and denying in part, Appellants' motion.[6] See Summit Med. Assocs. v. James, 984 F.Supp. 1404 (M.D.Ala.1998) [hereinafter Summit I]. Specifically, in granting Appellants' motion, the district court dismissed all claims for injunctive relief and those claims challenging the viability testing provisions of the post-viability abortion statute. The order left standing, however, Appellees' claims for declaratory relief against the other portions of both statutes. The district court also specifically rejected Appellants' Eleventh Amendment and standing defenses, reasoning that since the Appellants may be engaged in an ongoing violation of federal law, the Ex parte Young exception to Eleventh Amendment immunity applied.[7] Moreover, the district court found that Appellees had alleged a sufficiently credible threat of prosecution to establish standing to bring suit in federal court.

Appellants gave timely notice of appeal on February 13, 1998. They also filed a motion to stay proceedings in the district court pending a ruling on appeal. On March 19, 1998, the district court granted the motion to stay. See Summit Med. Assocs. v. James, 998 F.Supp. 1339 (M.D.Ala.1998) [hereinafter Summit II]. This interlocutory appeal followed.

II.

We review issues of federal subject matter jurisdiction de novo. See University of S. Ala. v. American Tobacco Co., 168 F.3d 405, 408 (11th Cir.1999). Similarly, a district court's denial of a motion to dismiss on Eleventh Amendment

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[6]As part of its ruling, the district court also certified questions to the Supreme Court of Alabama, as allowed under Rule 18 of the Alabama Rules of Appellate Procedure. On February 13, 1998, however, the Alabama Supreme Court declined to answer the certified questions.

[7]The district court's reasoning is expressed both in its January 26 opinion, see Summit I, 984 F.Supp. 1404, and in its decision to stay proceedings pending resolution of this appeal, see Summit Med. Assocs. v. James, 998 F.Supp. 1339 (M.D.Ala.1998).

grounds is a question of law subject to de novo review. See Seminole Tribe v. Florida, 11 F.3d 1016, 1021 (11th Cir.1994), aff'd, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

A.

Jurisdiction

As an initial matter, we must address our jurisdiction to review Appellants' claims. Appellants raise two issues on interlocutory appeal: (1) whether the district court erred in concluding that Appellants were not entitled to Eleventh Amendment immunity; and (2) whether the district court erred in holding that Appellees have standing to commence this cause of action. We unquestionably have jurisdiction under the collateral order doctrine to consider the question of sovereign immunity. However, we decline to exercise discretionary pendent appellate jurisdiction to review the district court's determination of standing.

A district court's denial of a motion to dismiss on Eleventh Amendment immunity grounds is appealable immediately. See In re Burke, 146 F.3d 1313, 1316 (11th Cir.1998) (citing Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)), petition for cert. filed, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-906); Schopler v. Bliss, 903 F.2d 1373, 1377 (11th Cir.1990). This right to an interlocutory appeal stems from the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), as an exception to the finality requirement of 28 U.S.C. § 1291 (1994). Under Cohen, an order is appealable if it (1) "conclusively determine[s] [a] disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) "[is] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). In Puerto Rico Aqueduct, the Supreme Court squarely held that an order denying a defendant Eleventh Amendment immunity is a collateral order subject to immediate interlocutory appeal. See 506 U.S. at 147, 113 S.Ct. 684. Therefore, we have jurisdiction under 28 U.S.C. § 1291 to

resolve Appellants' sovereign immunity claim now.

In contrast to the question of Eleventh Amendment immunity, however, we have held that a district court's denial of a motion to dismiss on justiciability grounds is not immediately appealable under the collateral order doctrine. See Crymes v. DeKalb County, 923 F.2d 1482, 1484-85 (11th Cir.1991) (ripeness); see also Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1418 (6th Cir.1996) (Batchelder, J., concurring) (citing Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496-97 n. 2 (7th Cir.1993) (holding that standing is not appealable immediately under collateral order doctrine); Shanks v. City of Dallas, 752 F.2d 1092, 1099 n. 9 (5th Cir.1985) (rejecting interlocutory appeal of standing on ground that issue was "enmeshed" with merits of cause of action); City of Detroit v. Grinnell Corp., 495 F.2d 448, 474-75 (2d Cir.1974) (refusing to review standing question on interlocutory appeal because resolution of issue was merely a " 'step [ ] towards final judgment in which [it] will merge' ") (citation omitted)). Although a district court's standing determination conclusively resolves a disputed question and settles an important issue separate from the merits of the case, courts have recognized that the issue of standing is not effectively unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order doctrine. See, e.g., Triad, 10 F.3d at 496-97 n. 2. In light of this unambiguous precedent, we conclude that the question of standing does not fit within the collateral order doctrine, and, therefore, that Appellants may not as of right take an immediate interlocutory appeal on this issue.[8]

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[8]At least one circuit judge has elected to consider standing as part of an otherwise proper interlocutory appeal of Eleventh Amendment immunity. In Deters, Judge Batchelder, writing separately, concluded sua sponte that the issue of standing necessarily comes before an appellate court when another issue is properly appealed. See 92 F.3d at 1419 (Batchelder, J., concurring). In reaching this determination, the Judge emphasized that "[c]onstitutional standing is always a threshold inquiry" on appeal because federal courts have "an independent obligation to examine [their] own jurisdiction." Id. Judge Batchelder elected to reach the

Notwithstanding the unavailability of the collateral order doctrine to the standing issue, however, we may, within our discretion, exercise jurisdiction over otherwise nonappealable orders under the pendent appellate jurisdiction doctrine. See Crymes, 923 F.2d at 1485. Under this doctrine, a federal appellate court may address nonappealable orders if they are "inextricably intertwined" with an appealable decision or if "review of the former decision [is] necessary to ensure meaningful review of the latter." Swint v. Chambers County Comm'n, 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995); see also Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir.1997) (reviewing nonappealable order compelling production with appealable sanctions order); United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n. 10 (11th Cir.1997) (reviewing nonappealable order striking portion of indictment with appealable order excluding evidence from trial). In Swint, the Supreme Court considered the propriety of exercising pendent appellate jurisdiction over an otherwise nonappealable issue that concerned parties different from those involved in the appealable qualified immunity question. See 514 U.S. at 41, 115 S.Ct. 1203. Although the Court declined to settle definitively the application of pendent appellate jurisdiction to related issues, it held that this use of pendent appellate jurisdiction was improper because the issues were neither intertwined nor essential to each other. See id. at 50-51, 115 S.Ct. 1203. Under this doctrine, therefore, we may exercise jurisdiction over standing only if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other.

This question is governed by our decision in Moniz v. City of Fort Lauderdale, 145 F.3d 1278 (11th Cir.1998). In

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merits of standing on appeal, therefore, not as an independently appealable collateral order, but as a part of a federal court's obligation to satisfy itself that a matter is justiciable. However, in light of our case precedent, see Moniz v. City of Ft. Lauderdale, 145 F.3d 1278 (11th Cir.1998), we do not have occasion to consider the merits of this argument..

Moniz, we considered on interlocutory appeal whether to review standing under our pendent appellate jurisdiction where Appellants had also appealed, under the collateral order doctrine, the district court's rejection of their qualified immunity defense. See id. at 1281 n. 3. Upon consideration of whether the issues were "inextricably intertwined" or whether a determination of one was "necessary to ensure meaningful review" of the other, we concluded the following:

> Because we may resolve the qualified immunity issue in this case without reaching the merits of appellants' challenge to Moniz's standing, ... we conclude that the latter issue does not come under either of these categories and thus does not fall within our pendent appellate jurisdiction under Swint.

Id. As in Moniz, we may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing.[9] These issues are neither "inextricably intertwined" nor "necessary to ensure meaningful review" of one another. As the district court observed:

> [T]he attorney general defendants' arguments regarding the plaintiffs' alleged failure to show that they face an imminent and credible threat of prosecution [with respect to standing] ... are completely irrelevant to the eleventh-amendment-immunity issue that they raise on appeal.... By contrast, the attorney general defendants' contentions regarding the lack of an imminent prosecution are, of course, directly relevant to the distinct question [ ] of whether the plaintiffs enjoy standing to sue in federal court ... [and] are not implicated by the attorney general defendants' appeal to the Eleventh Circuit.

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[9]Qualified immunity, like sovereign immunity, is an immunity from litigation and not just from liability. See Mitchell v. Forsyth, 472 U.S. 511, 526-27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, we believe that our reasoning in Moniz applies with equal force to an interlocutory appeal of Eleventh Amendment immunity.

Summit II, 998 F.Supp. at 1350. Therefore, because we conclude that Appellants have failed to satisfy the test set forth in Swint, and because of our unambiguous precedent in Moniz, we decline to exercise discretionary pendent appellate jurisdiction to address here the question of Appellees' standing to commence this action. We turn, therefore, to the merits of sovereign immunity.

B.

Eleventh Amendment

The Eleventh Amendment to the United States Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment not only bars suits against a state by citizens of another state, but also applies equally to suits against a state initiated by that state's own citizens. See Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Hans v. Louisiana, 134 U.S. 1, 13-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Moreover, the Eleventh Amendment prohibits suits against state officials where the state is, in fact, the real party in interest. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). For example, if a lawsuit seeks to order the state officer to pay funds directly from the state treasury for the wrongful acts of the state, then the state is the real party in interest and the Eleventh Amendment bars the suit.

Under the doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, there is a long and well-recognized exception to this rule for suits against state officers seeking prospective equitable relief to end continuing violations of federal law. See Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) ("We do not ... question the continuing validity of the Ex parte Young doctrine."). Because Appellees, citizens of Alabama, have sued Alabama state officers to obtain declaratory relief, the parties agree that this lawsuit must be dismissed unless

it falls within Ex parte Young 's exception to the Eleventh Amendment.

The Eleventh Amendment generally does not bar the exercise of the judicial power of the United States where a plaintiff seeks to compel a state officer to comply with federal law. See Ex parte Young, 209 U.S. at 158-59, 28 S.Ct. 441. Because the enforcement of "an unconstitutional statute is void, and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States,' " the Supreme Court has held that the officer is not entitled to protection by the state's sovereign immunity. Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (quoting Ex parte Young, 209 U.S. at 160, 28 S.Ct. 441); see also Coeur d'Alene, 521 U.S. at 288, 117 S.Ct. 2028 (O'Connor, J., concurring) ("The Young doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity."). This doctrine has, therefore, been described as a legal "fiction" because it creates an imaginary distinction between the state and its officers, deeming the officers to act without the state's authority, and, hence, without immunity protection, when they enforce state laws in derogation of the Constitution. See Pennhurst, 465 U.S. at 114 n. 25, 104 S.Ct. 900.

Thus, the availability of this doctrine turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief. As the Supreme Court has explained:

Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of

that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (quoting Green, 474 U.S. at 68, 106 S.Ct. 423). Therefore, the Eleventh Amendment bars suits against state officials in federal court seeking retrospective or compensatory relief, but does not generally prohibit suits seeking only prospective injunctive or declaratory relief. See Green, 474 U.S. at 68, 106 S.Ct. 423. If the prospective relief sought is the functional equivalent of money damages, however, i.e., "[i]t is measured in terms of a monetary loss resulting from a past breach of a legal duty," Ex parte Young does not apply. Edelman, 415 U.S. at 669, 94 S.Ct. 1347.

Because of the important interests of federalism and state sovereignty implicated by Ex parte Young, however, the doctrine is not without limitations--indeed, two are relevant to this appeal. First, the Ex parte Young doctrine applies only to ongoing and continuous violations of federal law. See Papasan, 478 U.S. at 277-78, 106 S.Ct. 2932; Green, 474 U.S. at 68, 106 S.Ct. 423. In other words, a plaintiff may not use the doctrine to adjudicate the legality of past conduct. See Papasan, 478 U.S. at 277-78, 106 S.Ct. 2932. This requirement protects states by setting "a minimum threshold for abrogating a state's constitutional immunity." Booth v. Maryland, 112 F.3d 139, 142 (4th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998). Second, in Idaho v. Coeur d'Alene Tribe, the Supreme Court recently said that the Ex parte Young doctrine does not apply where the equitable relief sought "implicates special sovereignty interests." 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Thus, if prospective relief would invade a state's sovereignty as much as an award of money damages would, the action will be barred by the Eleventh Amendment.

Against this backdrop, we turn to the application of Ex parte Young to this lawsuit initiated by abortion providers against the Governor of Alabama, the Attorney General, and the District Attorney challenging the criminal liability provisions of Alabama's post-viability and partial-birth

abortion statutes. Appellants raise two basic arguments in support of their immunity defense. First, they contend that the district court erred in concluding that Appellants were engaged in an ongoing and continuous violation of federal law. According to Appellants, Appellees have not challenged any action that an Alabama officer has undertaken or has threatened to undertake; rather, Appellees have challenged only the responsibilities such officers have in their status as state officials. Appellants argue that so bare a possibility of enforcement does not present a sufficient danger to federal rights to justify a federal court's invasion of Alabama's sovereign immunity. Second, Appellants argue that Coeur d'Alene 's limitation on Ex parte Young applies to this case because of the state's significant interest in regulating late-term abortions of viable fetuses. Because we believe that this case falls squarely within the Ex parte Young exception to the Eleventh Amendment, we find Appellants' arguments unavailing.

As we discussed earlier, Ex parte Young requires the allegation of an ongoing and continuous violation of federal law. See Coeur d'Alene, 521 U.S. at 281, 117 S.Ct. 2028 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction."). This requirement does not mean that the enforcement of the allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit. Rather, we agree with the district court that the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature, i.e., designed to prevent injury that will occur in the future, and cases where relief is retrospective. As the Supreme Court explained in Papasan, "Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." 478 U.S. at 277-78, 106 S.Ct. 2932. Similarly, in Green v. Mansour, the Supreme Court recognized that where there "was no threat of state officials violating the repealed law in the future," the Eleventh Amendment prohibited the issuance of a declaratory judgment to adjudicate past violations of federal law. See 474 U.S. at 73, 106 S.Ct. 423. Thus, where there is a threat of

future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied.

Appellants contend, however, that under Ex parte Young, a state officer's enforcement of an allegedly unconstitutional state law must be imminent, not merely threatened. We decline to adopt so limited a view of the Ex parte Young doctrine. Indeed, Ex parte Young recognized the very real reason a plaintiff may need a vehicle to challenge the constitutionality of a state law before enforcement is imminent. In Ex parte Young, plaintiffs brought suit in federal court against, inter alia, the Minnesota Attorney General to enjoin his enforcement of an allegedly unconstitutional state statute in Minnesota state court. See 209 U.S. at 129-32, 28 S.Ct. 441. The Supreme Court unambiguously recognized the efficacy of pre-enforcement challenges:

It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the [plaintiff] from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the [plaintiff] from seeking judicial construction of laws which deeply affect [his] rights.

Id. at 147, 28 S.Ct. 441. The Ex parte Young doctrine does not demand that a plaintiff first risk the sanctions of imminent prosecution or enforcement in order to test the validity of a state law.

Moreover, Appellants' imminence requirement would essentially render Ex parte Young a nullity, leaving plaintiffs with only the most narrow window in which to initiate suit in federal court. Under the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), once a state prosecution is pending, a criminal defendant is barred from challenging the constitutionality of a state law in federal court except under very limited circumstances. In Younger, the Supreme Court held that a federal court could enjoin a pending state criminal proceeding only if "the danger of irreparable loss is both great and immediate," and only if

"the threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." Id. at 45-46, 91 S.Ct. 746 (internal citation and quotation marks omitted). But so long as the state criminal proceeding is " 'brought lawfully and in good faith,' " a state defendant is not free to sue in federal court to enjoin a state court prosecution. Id. at 49, 91 S.Ct. 746 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164, 63 S.Ct. 877, 87 L.Ed. 1324 (1943)). Thus, the initiation of a state criminal proceeding generally cuts short the availability of Ex parte Young.

When a state criminal proceeding is not pending, however, federal equitable relief is permissible. In Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), a plaintiff who had been threatened with arrest for trespass if he continued to distribute handbills at a shopping center sought a declaratory judgment that the state trespass statute was unconstitutional. The Supreme Court held that Younger did not bar the federal declaratory action because, since no state prosecution was pending, there was no danger of duplicating or disrupting the state court proceeding. See id. at 462, 475, 94 S.Ct. 1209. The Court also noted that "a refusal on the part of the federal courts to intervene ... may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity." Id. at 462, 94 S.Ct. 1209. Appellants' imminence requirement would force a plaintiff into precisely this predicament. In order for prosecution to be sufficiently imminent, a potential plaintiff would have to risk state criminal prosecution. If the plaintiff does not take that risk, however, by declining to engage in any arguably proscribed conduct, he must forego an adjudication of his claim in federal court.

We are unable to understand how, as a practical matter, a potential plaintiff will ever be able to predict when prosecution is indeed "imminent." Certainly, a prosecutor has no obligation to inform a target that she is planning to bring criminal charges, or that prosecution is imminent. These decisions are committed entirely to the sound discretion of the prosecutor. Cf. United States v. Cespedes, 151 F.3d 1329,

1332 (11th Cir.1998) (" '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.' " (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978))), cert. denied, --- U.S. ----, 119 S.Ct. 836, 142 L.Ed.2d 692 (1999); United States v. Thomas, 62 F.3d 1332, 1339 (11th Cir.1995) ("A prosecutor has no obligation to bring charges as soon as she has enough evidence to indict; instead, she may wait until she is satisfied that she has enough evidence to establish guilt beyond a reasonable doubt."). In short, if a plaintiff were barred from airing his grievance in federal court while an investigation was pending before a grand jury or prosecutor because he did not know and could not prove that his prosecution was imminent, and if a plaintiff were similarly barred while the prosecution was pending in state court--as he plainly would be under Younger v. Harris--then the avenue for seeking prospective relief in a federal forum would be slender indeed. We can find no such imminency requirement in Supreme Court case precedent, and we decline to graft one onto the long-recognized doctrine of Ex parte Young.

Here, Appellees unquestionably seek prospective relief--a declaratory judgment that the partial-birth and post-viability abortion statutes are unconstitutional. Although Appellants have not yet initiated prosecution, nor have they specifically threatened Appellees with prosecution, Appellants do intend to prosecute violators of both statutes, at least in cases where the fetus is viable.[10] Moreover, as Appellants concede, the Attorney General could withdraw the enforcement directive and prosecute partial-birth abortions pre-viability. Given the severity of the potential penalties--up to ten years for the partial-birth abortion statute and up to ninety-nine years for the post-viability abortion statute-- Appellees would not have to be very risk averse to avoid any arguably proscribed conduct that may come within the reach of these statutes. In short, Appellees have sufficiently

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[10]See Letter from Attorney General (August 1, 1997).

alleged an ongoing and continuous violation of federal law.[11]

Turning to Appellants' second argument, we are not persuaded that Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), has any bearing on this case. In Coeur d'Alene, an Indian tribe sought both declaratory and injunctive relief to resolve the tribe's right to quiet enjoyment over certain state lands. See id. at 264-65, 117 S.Ct. 2028. The Supreme Court found that the Eleventh Amendment barred the action notwithstanding the fact that the tribe sought only prospective equitable relief. See id. at 287-88, 117 S.Ct. 2028. The Court reasoned that "if the Tribe were to prevail, Idaho's sovereignty interests in its lands and waters would be affected in a degree fully as intrusive as almost any conceivably retroactive levy upon funds in its

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[11]We also find Appellants' remaining arguments unpersuasive. First, Appellants contend that, in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Supreme Court held that the Ex parte Young doctrine requires some imminence of prosecution. See id. at 381-83, 112 S.Ct. 2031. However, in Morales, the Court cited to Ex parte Young only in the context of determining whether there was sufficiently imminent and irreparable injury to support an award of injunctive relief. See id. at 381, 112 S.Ct. 2031. The Court never discussed the Eleventh Amendment or the Ex parte Young exception because it was not at issue in the case. Accordingly, Morales does not control this case. Second, Appellants argue that "Young does not apply when a defendant state official has neither enforced not threatened to enforce the allegedly unconstitutional state statute." Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1415 (6th Cir.1996). In Deters, however, the defendant in question had no authority to enforce the statutes under Ohio law. See id. at 1417. Moreover, the plaintiffs did not even seek to enjoin the statutes' enforcement. Rather, the plaintiffs asked the court to permit broader enforcement of the statutes by striking out certain provisions. See id. at 1416. Given the absence of any connection between the state officer defendant and any enforcement of the statutes, as well as the odd nature of the relief sought, the court could not justify applying Ex parte Young. See id. at 1414. Therefore, we similarly conclude that Deters does not apply to this matter.

Treasury." Id. at 287, 117 S.Ct. 2028. Thus, because the relief sought implicated the state's "special sovereignty interests" and was the "functional equivalent" of relief that would otherwise be barred by the Eleventh Amendment, the Court concluded that the Ex parte Young doctrine did not apply. Id. at 281, 117 S.Ct. 2028.

Unlike the quiet title action in Coeur d'Alene, the relief sought here does not implicate the state's real property interests that the Supreme Court found to be protected by the Eleventh Amendment. Undoubtedly Alabama has a significant interest in regulating abortions of viable fetuses. However, the remedy of a declaratory judgment is not the "functional equivalent" of a form of relief barred by the Eleventh Amendment. A declaratory judgment will establish only the constitutionality of these statutes; it will not prevent the state from regulating late-term abortions in other ways. In contrast, the remedy in Coeur d'Alene would have resolved, for all time, Idaho's property interests in the disputed submerged lands. As the Court emphasized:

> The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282, 117 S.Ct. 2028. Moreover, a successful challenge to the statutes at issue today will not in any way render this inherently prospective relief retrospective by implicating Alabama's treasury. See Edelman, 415 U.S. at 666-69, 94 S.Ct. 1347. Accordingly, the instant case is different from Coeur d'Alene.

In short, the Eleventh Amendment does not bar Appellees' challenge to the criminal liability provisions of the partial-birth and post-viability abortion statutes. We stress, however, that today we decide only the Eleventh Amendment issue raised in this interlocutory appeal. We have no occasion to reach, and do not examine in any way, whether the partial-birth and post-viability abortion statutes

are constitutional under the Fourteenth Amendment. We hold only that the Eleventh Amendment does not bar this suit with respect to the criminal liability provisions.

We reach a different result, however, as to Appellants' claim that the Eleventh Amendment bars Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute.[12] Specifically, Appellants also argue, and we agree, that the doctrine of Ex parte Young cannot operate as an exception to Alabama's sovereign immunity where no defendant has any connection to the enforcement of the challenged law at issue.

The Eleventh Amendment bars Appellees' challenge to the private civil enforcement provision of the partial-birth abortion statute. In Ex parte Young, the Supreme Court observed:

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

... The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the

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[12]Appellants did not raise this argument below. Rather, they merely argued, and the district court rejected, that there was no state action with respect to the private civil enforcement provision. Although we generally decline to address arguments raised for the first time on appeal, it is within our discretion to do so. See Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir.1982). Because this issue "involves a pure question of law" and our "refusal to consider it would result in a miscarriage of justice," we will reach the merits of whether Appellees may challenge the private civil enforcement provision of the partial-birth abortion statute under the doctrine of Ex parte Young. Id. (citing Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir.1976)).

important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157, 28 S.Ct. 441. Therefore, unless the state officer has some responsibility to enforce the statute or provision at issue, the "fiction" of Ex parte Young cannot operate. Only if a state officer has the authority to enforce an unconstitutional act in the name of the state can the Supremacy Clause be invoked to strip the officer of his official or representative character and subject him to the individual consequences of his conduct. See id. at 159-60, 28 S.Ct. 441.

In Fitts v. McGhee, 172 U.S. 516, 19 S.Ct. 269, 43 L.Ed. 535 (1899), the Court expounded on the nature of this "connection" between the state officer and the challenged statute:

There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the

Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Id. at 529-30, 19 S.Ct. 269. Accordingly, federal courts have refused to apply Ex parte Young where the officer who is charged has no authority to enforce the challenged statute. See, e.g., Deters, 92 F.3d at 1416-17 (refusing to apply Ex parte Young to action against Attorney General where only local prosecutors had authority to enforce challenged statute). Compare Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."), with Luckey v. Harris, 860 F.2d 1012, 1015-16 (11th Cir.1988) (holding that Governor has sufficient contacts with alleged unlawful action because he is responsible for law enforcement, has residual power to commence criminal prosecutions, and has final authority to direct the Attorney General to prosecute on behalf of the state).

As Appellants correctly point out, only a husband or a maternal grandparent, see Ala.Code § 26-23-5, may enforce the civil provision of the partial-birth abortion statute. Since neither the Governor, the Attorney General, nor the District Attorney--the only defendants in this case--have any relationship to the enforcement of this provision, we conclude that the Ex parte Young doctrine does not apply. Therefore, we hold that Appellees' suit against the Governor, the Attorney General, and the District Attorney with respect to the private civil enforcement provision of the partial-birth abortion statute is barred by the Eleventh Amendment.

III.

In sum, we affirm the district court's order denying Appellants' motion to dismiss with respect to the statutes' criminal liability provisions because Appellees challenge to these provisions plainly falls within the exception to the Eleventh Amendment established in Ex parte Young. However, the Eleventh Amendment does bar Appellees' challenge to the private civil enforcement provision of the

partial-birth abortion statute because Appellants have no authority to enforce that provision as required by Ex parte Young and its progeny. Finally, we decline to exercise our pendent appellate jurisdiction over the question of standing. That issue may be litigated on appeal from any final judgment.

Accordingly, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED with instructions to the district court to dismiss Appellees' challenge to the private civil enforcement provision of the partial- birth abortion statute.

APPENDIX B

SUMMIT MEDICAL ASSOCIATES, P.C., et al., Plaintiffs,

v.

Fob JAMES, Jr., et al., Defendants.

Civil Action No. 97-T-1149-N.

United States District Court,

M.D. Alabama,

Northern Division.

Jan. 26, 1998.

MEMORANDUM OPINION

MYRON H. THOMPSON, Chief Judge.

The plaintiffs, Alabama-based providers of abortion services, challenge the constitutionality of two recently-enacted Alabama abortion statutes under the fourteenth amendment to the United States Constitution, as enforced through 42 U.S.C.A. § 1983 (West 1994). The first challenged statute is the Alabama Partial-Birth Abortion Ban Act of 1997, 1975 Ala.Code § 26-23-1 to 26-23-6 (Law.Co-op.Supp.1997), which took effect on August 1, 1997, and proscribes what it terms "partial-birth abortions," except under certain medical emergency circumstances. The second statute, the Alabama Abortion of Viable Unborn Child Act, 1975 Ala.Code §§ 26-22-1 to 26-22-4 (Law.Co- op.Supp.1997), took effect on August 12, 1997, and proscribes abortions performed after the fetus has achieved "viability." The plaintiffs seek declaratory and injunctive relief and have named as defendants the Governor of the State of Alabama, the Attorney General of the State of

Alabama, and the Montgomery District Attorney, in her official capacity and as a representative of the class of district attorneys for the State of Alabama. The jurisdiction of the court has been properly invoked pursuant to 28 U.S.C.A. §§ 1331 and 1343(a)(3) (West 1994).

This lawsuit is currently before the court on a motion to dismiss filed by the governor on September 4, 1997, and on a motion to dismiss filed by the attorney general and Montgomery district attorney (collectively, "the attorney general defendants"), also on September 4, 1997. A hearing was held on the motions on November 24, 1997. For the reasons that follow, the court will deny the governor's motion in its entirety, will grant the attorney general defendants' motion in part and deny it in part, and will certify certain pertinent questions of state law to the Alabama Supreme Court.

I. LEGAL STANDARD FOR MOTION TO DISMISS

In considering a defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the court accepts the plaintiffs' factual allegations as true, Jackson v. Okaloosa County, 21 F.3d 1531, 1534 (11th Cir.1994); Andreu v. Sapp, 919 F.2d 637, 639 (11th Cir.1990), and construes the complaint liberally in the plaintiffs' favor. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The action may not be dismissed unless "it appears to a certainty," Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957), that the plaintiffs can offer no set of facts supporting the relief requested. Scheuer, supra; Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir.1993).

II. BACKGROUND

The facts of this case, as alleged by the plaintiffs, are as follows. The Alabama Partial-Birth Abortion Ban Act of 1997 prohibits any physician from "knowingly" performing a "partial-birth abortion." 1975 Ala.Code § 26-23-3 (Law.Co-

op.Supp.1997).[1] Such an abortion is defined in the statute as

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[1]This act reads, in its entirety, as follows:

"§ 26-23-1. Short title.

This chapter may be cited as the 'Alabama Partial-Birth Abortion Ban Act of 1997.'

"§ 26-23-2. Definitions.

As used in this chapter, the following terms shall have the following meanings:

(1) FATHER. The biological father of the human fetus.

(2) MOTHER. The female who is pregnant with a live human fetus which may be subject to a partial-birth abortion under this chapter.

(3) PARTIAL-BIRTH ABORTION. An abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(4) PHYSICIAN. A doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state or any other individual legally authorized by the state to perform abortions. This definition shall also include any individual who is not a physician or is not otherwise legally authorized by the state to perform abortions, but who nevertheless performs a partial-birth abortion

"§ 26-23-3. Felony conviction.

Any physician who knowingly performs a partial-birth abortion within this state and thereby kills a human fetus shall be guilty of a Class C felony and upon conviction thereof shall be punished as prescribed by law.

"§ 26-23-4. Life of mother exception.

Section 26-23-3 shall not apply to a partial-birth abortion that is necessary to save the life of a mother.

"§ 26-23-5. Civil action.

The father, if married to the mother at the time she receives a partial- birth abortion procedure, and if the mother has not attained

"an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." § 26-23-2(3). Neither the term "partial-birth abortion," nor the foregoing definition, is generally accepted in the medical community.

The partial-birth abortion statute provides only a single exception to its ban, which applies where the abortion "is necessary to save the life of the mother." § 26-23-4. The act contains no similar exception to preserve the mental or physical health of the pregnant woman.

The partial-birth abortion statute carries criminal penalties, namely conviction of a Class C felony punishable by a fine of not more than $5,000 and imprisonment for up to ten years, and triggers the possibility of license revocation under Alabama law. § 26-23-3; see also 1975 Ala.Code §§ 13A- 5-6 & 13A-5-11 (Michie 1994); 1975 Ala.Code § 34-24-360(4) (Michie 1991). It also creates a civil cause of action against the physician, which may be brought by the "father" of the fetus, if married to the woman who underwent the abortion, or the "maternal grandparents" of the fetus, if the woman was a minor at the time. 1975 Ala.Code § 26-23-5 (Law.Co- op.Supp.1997).

On August 1, 1997, the day upon which the partial-birth abortion statute took effect, the Alabama attorney general forwarded a letter to four Alabama district attorneys

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the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. The relief shall be limited to a monetary compensation for all injuries, psychological and physical, occasioned by a violation under this chapter and monetary punitive compensation as allowed by law. "§ 26-23-6. Conspiracy.

A woman upon whom a partial-birth abortion is performed may not be prosecuted under this chapter for a conspiracy to violate this chapter or for any other offense which is unlawful under this chapter"

instructing them that for purposes of prosecutions brought under the act, "a physician partially delivers a living fetus before killing the fetus [as proscribed by the act] when the physician deliberately and intentionally delivers into the vagina a viable fetus, or a substantial portion of the viable fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." (Emphasis added.) In the letter, the attorney general stated that his instructions to the district attorneys were given pursuant to 1975 Ala.Code § 36-15-14 (Michie 1991), which provides in pertinent part as follows: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of any criminal case in any of the courts of this state."

The second challenged act, the Alabama Abortion of Viable Unborn Child Act, prohibits any person from "intentionally, knowingly, or recklessly" performing or inducing an abortion "when the unborn child is viable." 1975 Ala.Code § 26-22-3(a) (Law.Co-op.Supp.1997).[2] However,

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[2]This act reads, in its entirety, as follows:

"§ 26-22-1. Legislative findings and intent.

(a) The public policy of the State of Alabama is to protect life, born and unborn. This is particularly true concerning unborn life that is capable of living outside the womb. The Legislature of the State of Alabama finds there are abortions being done in Alabama after the time of viability and in violation of its public policy.

(b) The Legislature specifically finds the following:

(1) Medical evidence shows there is a survival rate of babies born between ages 23 weeks to 29 weeks gestational age of 64 percent to 94 percent.

(2) In Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the United States Supreme Court determined that viability may occur as early as 23 to 24 weeks gestational age. Also, the United States Supreme Court determined that requiring fetal viability testing at 20 weeks gestational age is constitutional, because there is up to a four week

margin of error in determining gestational age.

(3) In the latest year of Alabama statistical reporting, 1994, there were reported to be 182 abortions performed at 20 or more weeks gestational age. There were also 70 abortions performed where no gestational age was stated. (c) Subject to life and health exceptions to the mother, it is the intent of the Legislature to ban abortions of any unborn child that is capable of living outside the womb. To permit otherwise is a wanton disregard of human life.

"§ 26-22-2. Definitions.

The following words shall have the following meanings:

(1) ABORTION. The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child.

(2) FERTILIZATION. The fusion of a human spermatozoon with a human ovum.

(3) GESTATIONAL AGE. The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

(4) HOSPITAL. An institution licensed pursuant to the provisions of the law of this state.

(5) LIVE BIRTH. When used with regard to a human being, means that the human being was completely expelled or extracted from his or her mother and after such separation, breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles, or any brain-wave activity.

(6) MEDICAL EMERGENCY. The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(7) PREGNANT. The female reproductive condition of having a developing fetus in the body and commences with fertilization.

(8) UNBORN CHILD AND FETUS. An individual organism of the species homo sapiens from fertilization until live birth.

(9) VIABLE AND VIABILITY. The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

"§ 26-22-3. Prohibition, exceptions, and regulations.

(a) Prohibition. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.

(b) Exceptions.

(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in the substantial and irreversible impairment of a major bodily function of the woman.

(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable.

(c) Abortion regulated. Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:

(1) The physician performing the abortion certifies in writing that, based upon his or her medical examination of the pregnant

woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or serious risk of substantial and irreversible impairment of a major bodily function.

(2) The physician's judgment with respect to the necessity for the abortion has been concurred in by one other licensed physician who certifies in writing that, based upon his or her separate personal medical examination of the pregnant woman and his or her medical judgment, the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman.

(3) The abortion is performed in a hospital.

(4) The physician terminates the pregnancy in a manner which provides the best opportunity for the unborn child to survive, unless the physician determines, in his or her good faith medical judgment, that termination of the pregnancy in that manner poses a significantly greater risk either of the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman than would other available methods.

(5) The physician performing the abortion arranges for the attendance, in the same room in which the abortion is to be completed, of a second physician who shall take control of the child immediately after complete extraction from the mother and shall provide immediate medical care for the child, taking all reasonable steps necessary to preserve the child's life and health.

(d) Penalty. Any person who violates subsection (a) commits a Class A felony. Any person who violates subsection (c) commits a Class C felony.

"§ 26-22-4. Viability testing.

Except in the case of a medical emergency, prior to performing an abortion upon a woman subsequent to her first 19 weeks of pregnancy, the physician shall determine whether, in his or her good faith medical judgment, the child is viable. When the physician has determined that a child is viable, he or she shall report the basis for his or her determination that the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. When the physician has determined that a

such a post-viability' abortion may be performed where a physician "reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman." § 26-22-3(b)(1). "Viable and viability" are defined in the act as follows:

"The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

§ 26-22-2(9).

The post-viability abortion statute also imposes five additional procedural requirements upon a physician performing a post-viability abortion in the limited medical emergency circumstances under which such an abortion is permitted. § 26-22-3(b)(1) & (c)(1)-(5). These requirements are waived where the physician, in his or her reasonable medical judgment, determines that the nature of the medical

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child is not viable after the first 19 weeks of pregnancy, he or she shall report the basis for such determination.

"§ 26-22-5. Interpretation.

Nothing in this chapter shall be construed to recognize a right to abortion or to make legal an abortion that is otherwise unlawful."

This act, as enacted, also contained the following severability provision, which was not included in the statute as codified:

"If any provision, word, phrase, or clause of this act, or the application thereof, to any person, entity, or circumstance shall be held invalid, such invalidity shall not affect the remaining provisions, words, phrases, clauses, or application of this act, which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end, the provisions, words, phrases, and clauses of this act are declared to be severable."

emergency prevents compliance. § 26-22-3(c).

Pursuant to the post-viability abortion statute, all physicians performing abortions after the nineteenth week of pregnancy must make a good- faith medical judgment as to whether the fetus is viable. §§ 26-22-2(9) & 26-22-4. However, the plaintiffs allege, the act does not specify the point at which the pregnancy begins for purposes of determining whether the pregnancy is in its nineteenth week.

The post-viability abortion statute imposes criminal penalties against the person who intentionally, knowingly, or recklessly performs or induces a post-viability abortion. §§ 26-22-3(a) & (d). Specifically, that person has committed a Class A felony, punishable by imprisonment from ten to 99 years and fines up to $20,000. § 26-22-3(d); see also 1975 Ala.Code §§ 13A-5- 2, 13A-5-6(a)(1), & 13A-5-11(a)(1) (Michie 1994). The act also criminalizes, as a Class C felony, punishable by imprisonment from one year and one day to ten years and fines up to $5,000, the failure to comply with the procedural requirements for post-viability abortions set forth in § 26-22- 3(c)(1) to (5). 1975 Ala.Code § 26-22-3(d) (Law.Co-op.Supp.1997); see also 1975 Ala.Code §§ 13A-5-2, 13A-5-6(a)(3), & 13A-5-11(a)(1) (Michie 1994).

Four plaintiffs have brought this lawsuit. They all allege that they perform abortions in the state of Alabama. Plaintiff Summit Medical Associates, P.C. provides abortions through 24 weeks of pregnancy, measured from the time of the woman's last menstrual period, or "lmp"; plaintiff William Knorr, M.D., performs abortions at Summit Medical, and intends to perform such abortions through 24 weeks lmp; plaintiff New Woman, All Women Health Care provides abortions through 20 weeks lmp; and plaintiff Beacon Women's Center provides abortions through 18 weeks lmp.

All plaintiffs perform abortions through approximately 13 weeks lmp that they allege may fall within the proscription of the partial-birth abortion statute, and each intends to continue performing such abortions despite the existence of the act, in order to provide the best possible care for patients. Summit Medical and Dr. Knorr perform abortions

through 24 1/2 weeks lmp that they allege may fall within the proscription of the post-viability abortion statute, and both intend to continue performing such abortions despite the existence of the act, in order to provide the best possible care for patients. As a consequence of these intentions, all plaintiffs allege that they fear prosecution under either or both acts.

According to the latest data from Alabama, compiled in 1995, 89% of the 14,221 abortions performed in the state were performed through the first 13 weeks lmp, 9.7% were performed from 14 through 24 weeks lmp, and less than 1% were performed after week 19 lmp, with none reported to have been performed past 24 weeks lmp. It is not known at what stage 0.88% of abortions in the state were performed.

Numerous reasons underlie the decision to perform an abortion after 13 weeks lmp (that is, after the first trimester). These include health problems arising during pregnancy, diagnosis of fetal anomalies, either severe or fatal, and lack of patient resources at an earlier date.

Requiring that a woman travel out of state for an abortion procedure introduces time delays and expense that may preclude the woman from actually obtaining a desired abortion, as well as an attendant increase in risk. Additionally, any delay imposed on a woman seeking an abortion increases both the risks to her, and the costs of the procedure.

Several methods are used to effect post-first-trimester abortions. These include: suction curretage (in limited circumstances); both traditional and intact dilation and evacuation (D&E); induction methods using saline, urea, or prostaglandins; hysterotomy; and hysterectomy. The vast majority of abortions performed after 13 weeks lmp employ traditional and intact D&E, while induction methods account for a small minority of such abortions. Hysterotomy and hysterectomy are rarely employed in Alabama as abortion techniques.

The most appropriate procedure to use in a given case depends on a multitude of factors, including the woman's

health, any medical contraindications, physician skill, the woman's prior surgical history and desire to preserve fertility, the need to remove the fetus intact, the assessment of alternative risks, cost factors, and location.

According to the plaintiffs' allegations, the methods most often employed in traditional and intact D&E procedures may fall within the strictures of the partial-birth abortion act, because parts of the fetus sometimes pass into the vaginal canal. Moreover, the main alternative to the D&E procedures, the induction method, also may fall within the act's proscription because the fetus may partially emerge during the procedure while still "living."

The hysterotomy and hysterectomy procedures are major surgical procedures that are more dangerous than their counterparts, and rarely medically appropriate. These techniques do not appear, according to the plaintiffs, to fall within the proscription of the partial-birth abortion statute.

III. THE GOVERNOR'S MOTION TO DISMISS

In his motion to dismiss this lawsuit, the governor urges this court to recognize that the "United States Constitution does not address the subject of abortion" and further urges this court to comply with the oath of office taken by all federal judges to be bound to that Constitution by ignoring any Supreme Court precedents holding to the contrary.[3] According to the governor, the Supreme Court, as "a chief 'protector' of the abortion industry in America," has run roughshod over the Constitution in its abortion jurisprudence, and has, in the absence of a national consensus, "assumed the power to amend the Constitution itself" to create abortion rights that otherwise do not exist.[4] Consequently, the governor contends, for this court to abide by the Supreme Court's abortion decisions would be tantamount to an

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[3]Governor Fob James, Jr.'s brief in support of motion to dismiss, filed September 30, 1997, at 1.

[4]Id.

abdication of its duty to uphold "the Constitution as written and as legally amended under the authority of the 'people of the United States' alone."[5]

As the plaintiffs correctly observe, the governor asks this court to contravene long-established principles of Anglo-American law by urging it to disregard plainly controlling Supreme Court precedent. The Eleventh Circuit Court of Appeals underscored these fundamental principles in Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir.1983), aff'd, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), when it reversed an Alabama district court that "chose to disregard Supreme Court precedent" in an establishment clause case. In a section of its opinion entitled "Precedent," the Eleventh Circuit explained the governing principles as follows:

"Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.... Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' [Hutto v. Davis, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556.] See also, Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983).... Judicial precedence serves as the foundation of our federal judicial system. Adherence to it results in stability and predictability. If the Supreme Court errs, no other court may correct it."

Id. at 1532-33. The court further emphasized that Supreme Court precedent is to be adhered to even where the pertinent issues are subject to political debate, stating that "While many may disagree on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final

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[5]Id. at 9.

arbiter of constitutional disputes." Id. at 1536.

It cannot seriously be disputed that these bedrock principles apply with equal force to the Supreme Court's abortion jurisprudence, despite the sharp differences in public opinion that surround this politically-charged issue. For without these governing principles, embodied in the notion of the "rule of law", judges would be at liberty to pick and choose which Supreme Court decisions they wished to follow, with the result that no one would ever know what law applied to the citizenry of this country at any given time: chaos and anarchy would reign. The federal judicial system can no more operate under a scheme in which lower court judges could freely pick and choose higher court precedent than the governor could govern under a scheme in which state citizens to whom he is beholden could freely pick and choose the laws with which they would comply. It may be that Supreme Court abortion jurisprudence is "wrong," but the avenue for redress is to convince the Supreme Court itself to change its precedent or, failing that, to convince the people of the Country to amend the Constitution.

This court, therefore, will adhere to the controlling Supreme Court decisions pertaining to the regulation and proscription of abortions. Notwithstanding any allegations by the governor or the other defendants that these decisions are based on faulty premises or are otherwise infirm, this court refuses to disregard binding Supreme Court precedent, for it is that Court's prerogative alone to overrule one of its own precedents. See State Oil Co. v. Khan, --- U.S. ----, ----, 118 S.Ct. 275, 284, 139 L.Ed.2d 199 (1997). Accordingly, the court will deny the governor's motion to dismiss.

IV. ATTORNEY GENERAL DEFENDANTS' JURISDICTIONAL CHALLENGES

In addition to arguing that the plaintiffs have failed to state any claim in their complaint upon which relief may be granted, the attorney general defendants have raised a number of challenges to this court's authority to exercise jurisdiction over the plaintiffs' claims. It is to these challenges, which implicate numerous complex questions of federal

jurisdiction, that the court must first devote its attention.

Careful parsing of the briefs filed by the attorney general defendants reveals that they attempt to erect three distinct sets of jurisdictional hurdles to the bringing of this lawsuit in federal district court: first, that the plaintiffs' claims are barred by the eleventh amendment of the United States Constitution, which immunizes all of the named defendants from suit; second, that the court must abstain from hearing the plaintiffs' claims in view of various principles of comity and equity; and, third, that none of the plaintiffs' claims is justiciable because none satisfies the case-or- controversy requirements imposed by Article III of the United States Constitution. Unfortunately, but understandably, given the complexity of the issues involved and the opacity of the pertinent case law, the attorney general defendants in their briefs conflate, rather than treat as analytically distinct, the myriad issues raised by their various jurisdictional challenges. The plaintiffs, too, fail to address all of these issues in an organized fashion.

For the sake of clarity, and to ensure that it fully and properly resolves each of the attorney general defendants' challenges, the court will address them separately and systematically. First, it will determine whether, as the attorney general defendants contend, all of the plaintiffs' claims are barred by the eleventh amendment, so that the entire lawsuit must be dismissed. Next, the court will ascertain whether the suit as a whole, or any subset of the plaintiffs' claims, must be dismissed for lack of an Article III case or controversy. To resolve this issue, the court will address whether the plaintiffs enjoy standing to bring their various claims, as well as whether any of these claims has been rendered moot, and hence non-justiciable, in light of the defendants' post-filing actions. Finally, the court will determine whether any of the abstention doctrines, grounded on considerations of comity between the state and federal judicial systems, and on principles that govern federal courts sitting in equity, counsels dismissal of any of the plaintiffs' claims, or a stay pending resolution by the Alabama Supreme Court of any issues raised by these claims. As explained more fully below, with respect to the majority of the plaintiffs' claims for declaratory relief,

the court rejects all of the foregoing arguments proffered by the attorney general defendants, and will proceed to address whether the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted. However, the court will dismiss all claims for injunctive relief, because the plaintiffs have not satisfied the heavy burden required to establish a right to such relief under pertinent Supreme Court jurisprudence. Additionally, the court will certify, to the Alabama Supreme Court, questions of statutory construction pertinent to some of the plaintiffs' claims.

A. Eleventh Amendment Immunity

The attorney general defendants base their first challenge to the plaintiffs' right to bring this lawsuit on the eleventh amendment of the United States Constitution, which provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Eleventh amendment sovereign immunity has been held to apply to suits brought by citizens against their own state, and is likewise applicable to cases in which the court's jurisdiction is grounded on the existence of a federal question. See Seminole Tribe v. Florida, 517 U.S. 44, 68-74, 116 S.Ct. 1114, 1130-32, 134 L.Ed.2d 252 (1996). Here, it is undisputed that citizens of Alabama have sued Alabama state officials pursuant to the fourteenth amendment of the United States Constitution, and that the state has not waived its eleventh amendment sovereign immunity and thereby consented to suit. Consequently, as the parties recognize, the lawsuit must be dismissed, unless it falls within a longstanding--and still vital--exception to eleventh amendment immunity, first articulated by the Supreme Court in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law. The Court has explained this exception, commonly referred to as the Ex parte Young doctrine, as follows: "The theory of Young was that an

unconstitutional statute is void, and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.' Young also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. We have refused to extend the reasoning of Young, however, to claims for retrospective relief." Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985) (internal citations omitted). The Supreme Court has characterized the "authority-stripping" theory of Ex parte Young as a "fiction," because it creates an imaginary distinction between the state and its officers, deeming that the officers act without the state's authority when enforcing state laws in derogation of the Constitution. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 n. 25, 104 S.Ct. 900, 915 n. 25, 79 L.Ed.2d 67 (1984).

The parties are correct to observe that no defendant in the handful of challenges to partial-birth abortion statutes initiated in other federal district courts has attempted to evade suit on the basis of eleventh amendment immunity, and thus this issue is one of first impression in the partial-birth abortion arena. Moreover, the court is aware of only three decisions addressing general abortion statutes in which such a defense was raised. See Jane L. v. Bangerter, 794 F.Supp. 1528, 1530-31 (D.Utah 1992) (finding that the State of Utah had expressly and voluntarily waived its eleventh amendment immunity in a challenge to an abortion statute); Guam Society of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422, (D.Guam 1990) (holding that the eleventh amendment did not bar injunctive relief against enforcement of an abortion statute by the governor and attorney general of Guam), aff'd, 962 F.2d 1366 (9th Cir.1992); Akron Center for Reproductive Health v. Rosen, 633 F.Supp. 1123, 1128-30 (N.D.Ohio 1986) (holding that the state governor and attorney general were not proper parties in a constitutional challenge to an abortion statute, because enforcement of the challenged statute was clearly delegated to the prosecuting attorneys of the state, two of whom were found to be proper defendants in the action), aff'd sub nom., Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir.1988), rev'd on other grounds sub nom., Ohio v. Akron Center for Reproductive Health,

497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990).

Not surprisingly, the parties vigorously contest whether the Ex parte Young doctrine applies to this suit.

The attorney general defendants, predictably, assert that the plaintiffs' broad claims for relief may not be squeezed and contorted to fit within the extremely narrow confines carved out for the doctrine by applicable Supreme Court jurisprudence. The plaintiffs, by contrast, assert that the attorney general defendants, by misconstruing the pertinent case law, seek unduly to constrain the Ex parte Young doctrine in clear contravention of long-settled Supreme Court precedent.

The dispute surrounding this question, once stripped of all irrelevant rhetoric pertaining to the distinct issues of justiciability and abstention, which will be taken up below, may be distilled to two primary issues. First, the attorney general defendants argue, and the plaintiffs vigorously contest, that although the plaintiffs seek relief that is purely prospective, and so arguably falls within the purview of the Ex parte Young doctrine, the specific relief sought is sufficiently intrusive and connected to the state itself that the "fiction" worked by that doctrine should play no role here. The second primary argument proffered by the attorney general defendants in support of their eleventh amendment immunity claim is grounded on the Ex parte Young doctrine's requirement that the challenged conduct of the state officials be "ongoing" or "continuing," and not merely "threatened," for the exception to apply. The attorney general defendants contend that the plaintiffs face, at most, a speculative threat of prosecution under the statutes, and that consequently their claims do not qualify for the Ex parte Young exception. As explained more fully below, the court rejects both of these arguments, and holds that the plaintiffs' claims for declaratory and injunctive relief against the Alabama state officials fall squarely within the Ex parte Young doctrine as currently interpreted and applied by the Supreme Court.

In support of the their first argument regarding eleventh amendment immunity, the attorney general defendants rely primarily on the Supreme Court's recent

decision in Idaho v. Coeur d'Alene Tribe of Idaho, --- U.S. ----, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). In that case, the Court was confronted with the question of whether an eleventh amendment bar prevented a federal district court from adjudicating the Coeur d'Alene tribe's claims for declaratory and injunctive relief against the State of Idaho concerning the submerged lands and bed of Lake Coeur d'Alene, as well as various associated elements of the lake's water system. --- U.S. at ----, 117 S.Ct. at 2040. The relief sought by the tribe, characterized by the Court as "far-reaching and invasive," included declaratory relief to establish its entitlement to occupy and use the submerged lands, and injunctive relief to prohibit the state from regulating, or permitting or taking any action in violation of, the Tribe's exclusive rights of use and occupancy, quiet enjoyment and other ownership interest in the submerged lands. Id., --- U.S. at ----, ----, 117 S.Ct. at 2032, 2040.

The majority, while recognizing that "An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction," refused to apply the exception under the "particular and specific circumstances" of the case. Id. at ----, ----, 117 S.Ct. at 2040, 2043. In reaching its decision, the Court emphasized that the extensive relief sought by the tribe, at least in functional terms, was tantamount to a quiet title suit, which all agreed would be barred by the eleventh amendment absent waiver by the state. The Court explained:

"It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it. Despite this prohibition, the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe."

Id. at ----, 117 S.Ct. at 2040. Thus, the Court was plainly concerned that permitting the tribe to pursue the suit in federal court would constitute an impermissible affront to the state's sovereignty, and that such concerns must be given

weight even where the plaintiffs' claims formally are limited to declaratory and injunctive relief.

Despite the attorney general defendants' efforts to characterize the instant case as one raising such a conflict between the plaintiffs' claims for extensive relief and fundamental elements of state sovereignty, the court concludes that the holding in Coeur d'Alene is inapplicable to the facts presented here. The plaintiffs' desired relief, though it effectively would wipe two recently-enacted state statutes off the books, cannot be said to be as far-reaching or intrusive as that sought in Coeur d'Alene; here, unlike in Coeur d'Alene, the state's sovereign interest in exercising its authority over the challenged arena (certain forms of abortion) would not be so fundamentally diminished or eliminated because the state would be free to enact new, appropriate legislation if the relief sought were to be granted. By contrast, were the tribe in Coeur d'Alene to prevail on its claims in federal court, Idaho would have irretrievably lost, for all time, practically its entire power to regulate the disputed submerged lands. On this point, the Supreme Court was emphatic:

"The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands."

--- U.S. at ----, 117 S.Ct. at 2040. Simply stated, the plaintiffs here, unlike the Coeur d'Alene tribe, do not seek relief that is tantamount to relief that they are barred from obtaining from the state absent waiver of eleventh amendment immunity.

The foregoing conclusion is not undermined by the holdings in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39

L.Ed.2d 662 (1974), and Green v. Mansour, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), where the Supreme Court refused to apply the Ex parte Young doctrine despite the absence in the complaints in question of any claims for retroactive or monetary relief. Those cases, like Coeur d'Alene, presented the Court with circumstances in which the plaintiffs' claims, although couched in terms of injunctive or declaratory relief, would have had an effect on the states akin to a request for monetary damages or restitution. See Green, 474 U.S. at 73, 106 S.Ct. at 428 (holding that the eleventh amendment barred a claim for declaratory relief because issuance of such a judgment would have had "much the same effect as a full-fledged award of damages or restitution by the federal court"); Edelman, 415 U.S. at 665-66, 94 S.Ct. at 1356-57 (holding that relief labeled "equitable" in nature may fall outside the Ex parte Young doctrine, and hence be barred by the eleventh amendment, where the funds to satisfy the award must inevitably come from the state's general revenues).

It is difficult to imagine how the equitable relief sought by the plaintiffs in this action could have even a slight impact on Alabama's coffers, for the plaintiffs request neither compensatory damages nor retrospective relief of any type. Rather, in terms of the nature of the relief sought by the plaintiffs, this case conforms to the prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law.

The second issue that the court must address in relation to the attorney general defendants' eleventh amendment immunity argument concerns the assertion that the Ex parte Young exception is inapplicable here because the plaintiffs have failed to allege that the defendants are engaged in the requisite 'ongoing or continuing' violation of the Constitution or of federal law. According to the attorney general defendants, because the plaintiffs assert, at most, an extremely remote threat that prosecutions would be brought under the two challenged acts, they cannot possibly have alleged a constitutional violation that is 'ongoing or continuing' in nature.

The defendants correctly observe that the Supreme Court has employed the terms 'ongoing' and 'continuing' to describe constitutional and federal law violations that trigger the Ex parte Young exception. See, e.g., Coeur d'Alene, --- U.S. at ----, 117 S.Ct. at 2043 ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); Green, 474 U.S. at 67-68, 106 S.Ct. at 425-426 ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

Importantly, however, the attorney general defendants misconstrue the Supreme Court's use of those terms when they assert that the plaintiffs cannot satisfy the "ongoing or continuing" violation requirement because the challenged statutes are so freshly minted, and because no citizen has yet been targeted for prosecution. Specifically, the attorney general defendants fail to recognize that Ex parte Young itself addressed, and the doctrine it spawned applies to, situations in which prosecutions under a disputed state law are merely threatened, rather than underway or complete. See, e.g., Ex parte Young, 209 U.S. at 159-60, 28 S.Ct. at 454 (in pre enforcement challenge brought against state railroad ratesetting scheme, Court holds that "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in this person to the consequences of his individual conduct, the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."); Steffel v. Thompson, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (1974) (characterizing Ex parte Young as "holding that state officials who threaten to enforce an unconstitutional state statute may be enjoined by a federal court of equity") (emphasis added). In fact, the Supreme Court, in Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986), explained that in this context the term "ongoing"

is used in contradistinction to "cases in which federal law has been violated at one time or over a period of time in the past." (Emphasis added). In the latter situation, of course, compensatory relief would be implicated, and so recourse to Ex parte Young would be unavailing. See id.

For a violation of federal rights to be considered "ongoing," then, does not require that a prosecution under the challenged state statute be in progress, but rather that the alleged violation of federal rights not have taken place only in the past, such that only retrospective relief may be obtained. Here, the plaintiffs contend that they face a continuing threat of prosecution and civil liability under the two disputed acts, and that as a consequence they are unable to freely exercise their asserted constitutional rights without fear of arrest, prosecution or being haled into court pursuant to the acts' civil provisions. Moreover, both the governor and the attorney general have indicated that they intend to prosecute violators under the two abortion statutes. Accordingly, the court rejects the attorney general defendants' contention that application of the Ex parte Young doctrine is inappropriate on these facts because there are no "ongoing" prosecutions pending or contemplated against the plaintiffs.

It bears noting that in proffering these arguments regarding the absence of a pending prosecution the attorney general defendants conflate the considerations underlying the eleventh amendment immunity issue with those raised by both their Article III challenge to the justiciability of the plaintiffs' claims and their contention that the court should abstain from hearing this lawsuit under principles of equity and comity.[6] The court does recognize, of course, that the absence of a legitimate threat of prosecution under the challenged acts would derail the plaintiffs' suit on grounds

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[6]For instance, the attorney general defendants support their claim of eleventh amendment immunity by invoking the standards employed by courts to determine whether an Article III case or controversy has been raised, as well as those considered by federal courts in deciding whether to abstain from hearing a lawsuit so that the state's courts may first interpret an unclear state statute.

of lack of an Article III case or controversy. However, the court will not address these issues in the context of determining whether the eleventh amendment imposes a bar to this action, for they enjoy no relevance here. Rather, the court will reserve consideration of these issues until after the eleventh amendment question has been resolved, when it turns to questions of justiciability. In so doing, the court endeavors to avoid contributing to the general confusion and inconsistent reasoning that plagues much of the existing jurisprudence in this complex area of federal jurisdictional law.

The attorney general defendants also devote substantial space in their briefs to an argument that the Alabama state courts offer an adequate forum for the plaintiffs to vindicate their asserted fourteenth amendment rights, and so the Ex parte Young doctrine should not be applied to ensure a federal forum. This argument is inapt, however, because the attorney general defendants apparently proffer it on the mistaken assumption that this court's determination of the eleventh amendment immunity issue is governed by the case- by-case, balancing of state and federal interests approach espoused by Justice Kennedy in Parts II-B, II-C, and II-D of the principal opinion in Coeur d'Alene. An integral part of Justice Kennedy's approach, upon which the attorney general defendants place heavy reliance, is that courts should inquire into whether there are "special factors counselling hesitation" in exercising jurisdiction over claims against state officials in federal court. See Coeur d'Alene, U.S. at 2028, 117 S.Ct. at 2039 (quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971)). However, as the attorney general defendants themselves acknowledge, Justice Kennedy's approach in Parts II-B, II-C, and II-D of the principal opinion, including his injection of the Bivens-based inquiry into the Ex parte Young context, was shared by only one other member of the Court, Chief Justice Rehnquist; it was not only not adopted by a majority of the Justices, it was subject to express criticism by the seven remaining Justices. See Coeur d'Alene, U.S. at 2028, 117 S.Ct. at 2047 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) ("the principal opinion replaces a straightforward inquiry into whether a

complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors"); --- U.S. at ---- n. 6, ---- - ----, 117 S.Ct. at 2051 n. 6, 2055-58 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) (rejecting the principal opinion's balancing approach and its consideration of the adequacy of available state remedies in determining whether the Ex parte Young doctrine may be invoked). Thus, the attorney general defendants' assertions regarding the adequacy of the forum provided by the Alabama state courts for the adjudication of the constitutional issues raised by the plaintiffs' claims play no role in the court's analysis of the eleventh amendment immunity question. As Justice O'Connor stated in Coeur d'Alene: Ex parte Young is "applied '[e]ven if there is a prompt and effective remedy in a state forum. When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar.' " Id., --- U.S. at ----, 117 S.Ct. at 2045 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring) (citations omitted). This action, therefore, falls squarely within the well- established boundaries of the Ex parte Young doctrine, and the court is not persuaded otherwise by the fact that Alabama state courts stand ready and able to hear the plaintiffs' claims.

Moreover, to the extent that the attorney general defendants take the position that the plaintiffs must await a state criminal prosecution to secure their desired relief, their argument flies in the face of one of the central rationales underlying the Ex parte Young decision. In that case, the Supreme Court emphasized that those challenging the state criminal laws at issue faced heavy sanctions, including fines and imprisonment, if they opted to pursue their claims by disobeying the disputed laws and inviting state criminal prosecutions. The court reasoned: "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147, 28 S.Ct. at 448.

In the case at bar, the plaintiffs also face significant criminal sanctions for violation of the two challenged acts. Thus, no matter how faithfully the Alabama state courts would apply Supreme Court abortion jurisprudence in resolving an attack on the disputed statutes during a criminal proceeding, the court is not dissuaded from applying the Ex parte Young doctrine here. A state court criminal prosecution, with its attendant risk of heavy sanctions, simply is not an adequate forum for the vindication of the plaintiffs' constitutional rights.

For the foregoing reasons, the court rejects the attorney general defendants' contention that the plaintiffs' claims against them and the governor are precluded by the eleventh amendment to the United States Constitution.

B. Article III Case-or-Controversy Requirement

Because the court has concluded that the eleventh amendment does not bar this lawsuit from federal court, it must next address whether it may exercise jurisdiction over the plaintiffs' claims in view of a second constitutional barrier, the case-or-controversy requirement imposed by Article III. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' " Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S.Ct. 752, 757-58, 70 L.Ed.2d 700 (1982) (quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)) (citations omitted). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." Diamond v. Charles, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986).

The attorney general defendants contend that this threshold requirement has not been satisfied here, on two grounds. First, they argue that the plaintiffs do not enjoy standing to bring their claims for declaratory and injunctive relief in federal court. Second, they contend that any case or

controversy between the parties has been rendered moot as a result of the attorney general's directive to four district attorneys that they refrain from pursuing prosecutions under the partial birth abortion statute except under limited circumstances. The court will take up these two arguments in turn below.

i. Standing

A party must have standing to bring a lawsuit, for without it a federal court may not exercise jurisdiction to decide the underlying case. See Brooks v, Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1375 (11th Cir.1997) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). Standing encompasses both "constitutional requirements" imposed by Article III, and "prudential considerations." Valley Forge, 454 U.S. at 471, 102 S.Ct. at 757; see Brooks, 116 F.3d at 1375. To satisfy the constitutional mandates, a plaintiff must establish that: (1) she personally has suffered some actual or threatened injury as a result of the allegedly illegal conduct; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision by the federal court. See Valley Forge, 454 U.S. at 472, 102 S.Ct. at 758.

The prudential considerations governing the standing determination, on the other hand, include: (1) the principle that federal courts should avoid deciding generalized grievances presenting abstract questions of wide public significance; (2) the requirement that the plaintiff's claims fall within the zone of interests protected by the statute or constitutional guarantee at issue; and (3) the requirement that a plaintiff assert her own legal rights and interest, rather than the rights of third parties. See Church v. City of Huntsville, 30 F.3d 1332, 1335-36 (11th Cir.1994).

The attorney general defendants proffer three primary arguments in support of their contention that the plaintiffs

lack standing to bring this lawsuit in federal district court. First, with respect to both challenged statutes, the attorney general defendants argue that none of the plaintiffs has satisfied the first constitutional standing requirement recited above because none is able to establish the existence of any actual or threatened injury. Second, regarding the post-viability abortion statute, the attorney general defendants assert that none of the plaintiffs enjoys standing to bring this lawsuit because none engages in the specific conduct proscribed by the act. Finally, regarding the partial-birth abortion ban act, the attorney general defendants contend that none of the abortion clinic plaintiffs has standing because application of that act is explicitly limited to "physicians" or "any other individuals," and does not encompass entities such as hospitals or clinics.

Resolution of the issues raised by the first attack on the plaintiffs' standing, that they have established no actual or threatened injury, is governed by Supreme Court decisions that have addressed other challenges to the constitutionality of state criminal statutes. In one such decision, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979), the Supreme Court explained that "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." However, the Supreme Court emphasized that a legitimate threat of injury is sufficient to navigate the shoals of standing: "But 'one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " Id. (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923)). Nor does one who asserts that a criminal statute deters the exercise of her constitutional rights need first expose herself to actual arrest or prosecution before proceeding with her claim in federal court. Id., 442 U.S. at 298, 99 S.Ct. at 2309. See also Doe v. Bolton, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) (physicians challenging constitutionality of abortion statutes have standing "despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution.... They should not be required to await and undergo a criminal prosecution as the sole means

of seeking relief.") Accordingly, the Court held in Babbitt that the standing requirement may be satisfied "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." 442 U.S. at 298, 99 S.Ct. at 2309.

The record before the court establishes that the plaintiffs have indeed alleged their intention to continue to conduct abortion operations, which the Supreme Court arguably has sheathed in a constitutionally-protected mantle, and which the plaintiffs assert to be proscribed by the two challenged statutes. Thus, the question before the court is whether the plaintiffs have succeeded in alleging that they do in fact face a "credible threat of prosecution" under the two abortion statutes at issue here.

A credible threat, of course, must be more than merely imaginary or speculative, see Babbitt, 442 U.S. at 298, 99 S.Ct. at 2309, but must be both "real and immediate, not conjectural or hypothetical." O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). It is also important to note that the court looks to the plaintiffs' allegations in determining the standing issue, for while it is true that the plaintiffs must demonstrate an immediate threatened injury as a prerequisite to obtaining preliminary injunctive relief, they need only allege such injury to establish their standing. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980).

Applying the foregoing principles to the facts presented here, the court has no difficulty concluding that the plaintiffs have indeed made sufficient allegations of a credible threat of prosecution to establish their standing to bring this lawsuit. As was the case in Bolton, the plaintiffs here challenge vital statutes of recent vintage, and there is nothing in the record to suggest that the state authorities will refrain from bringing prosecutions under them to the full extent permitted by the statutes' provisions. Although, as discussed more fully below, the Alabama attorney general has instructed four district attorneys to pursue prosecutions under the partial-birth abortion enactment only under

particular circumstances, the court is unaware of any evidence to suggest that the plaintiffs do not risk prosecution under either challenged act for performing certain of their abortion procedures, especially in view of the plaintiffs' allegations concerning the vagueness of, and broad net cast by, the statutes. Simply stated, the two challenged abortion acts are vital enactments that the state shows no indication of ignoring, and that, if the plaintiffs' allegations are accepted as true, specifically target procedures that the plaintiffs provide to their patients on an ongoing basis. Thus, the court concludes that the plaintiffs have indeed alleged that they face a sufficiently credible threat of enforcement to establish their standing to sue.

The attorney general defendants dispute that the alleged threat to the plaintiffs is sufficiently direct and immediate to imbue them with standing, citing Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), and a Fourth Circuit decision, Doe v. Duling, 782 F.2d 1202, 1208 (1986), to argue that the plaintiffs must show more to establish standing than the fact that state officials "stand ready to perform their general duty to enforce laws." Examination of the factual contexts presented in Ullman and Duling, however, reveals that these cases are a far cry from the instant dispute with respect to the immediacy of the threat that the plaintiffs allegedly face.

For instance, in Ullman, the plaintiffs sought to challenge in federal district court a Connecticut statute enacted in 1879 that purported to prohibit the rendering of medical advice on the use of contraceptives. That hoary statute had never, with a single possible exception, been used to prosecute any physicians. Similarly, the Virginia statutes under attack in Duling, which proscribed "fornication and cohabitation," had never been used as a basis for arrests or prosecution, except in the limited contexts of prostitution or non-private behavior, which were not at issue in the suit. The unmarried plaintiffs in Duling, claiming to be fearful of prosecution under the statutes for cohabitating or engaging in sexual intercourse, sought declaratory and injunctive relief. In both cases, the courts refused to hold that the plaintiffs had established standing, because of the remoteness of the

possibility that they would ever be prosecuted under the challenged statutes.

Ullman and Duling may best be characterized as unusual cases in which the plaintiffs sought to wipe disfavored, and allegedly anachronistic, laws off the books. In fact, the Supreme Court in Bolton distinguished the live abortion statute at issue in that case from the statute challenged in Ullman, tersely observing that the former was "recent and not moribund." Bolton, 410 U.S. at 188, 93 S.Ct. at 746. Likewise, this court notes that the two acts at issue in the instant dispute are far from moribund,[7] and the plaintiffs' objective is not merely to expunge allegedly obsolete laws from the state's books. Rather, the plaintiffs here challenge newly-minted laws bearing directly on their professional activities and the source of their livelihood. As a result, the holdings in Ullman and Duling have little to say in the present context.

Nor do the Supreme Court decisions in Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), O'Shea v. Littleton, supra, or City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), resuscitate the defendants' argument. In each of these cases, the Court's holding that the plaintiffs lacked standing stemmed primarily from the fact that future unconstitutional injury to the plaintiffs was far too conjectural, being subject to contingencies that were, at best, only remotely possible, to be sufficiently real and immediate. For instance, in Golden, the plaintiff sought a declaratory judgment invalidating a statute that

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[7]The attorney general defendants do, in effect, argue that the partial-birth abortion ban act is moribund when they assert that no prosecutions for pre-viability abortions will be brought under the act as a consequence of the attorney general's letter to the district attorneys. However, this contention properly is addressed under the mootness element of the Article III case or controversy requirement, and the court will address it as such below, where it finds, to paraphrase Mark Twain, that the attorney general defendants' reports of the statute's demise are greatly exaggerated.

prohibited the distribution of anonymous handbills pertaining to election campaigns. Under the particular circumstances of the case, the only possible threatened prosecution would have revolved around the plaintiffs' distribution of handbills concerning a single congressional candidate, who had been appointed to the Supreme Court of New York for a 14-year term, and hence would be unlikely to run for Congress again. The Court held that, given this scenario, it was "wholly conjectural" that any future prosecutions would be advanced against the plaintiff, and that, as a consequence, he did not have standing to sue for declaratory relief. Similarly, in both Lyons and O'Shea, any future recurrences of the putative threatened injury against the plaintiffs hinged upon two speculative events: first, that the plaintiffs would proceed to violate an unchallenged criminal law; and, second, that, in the course of the defendants' response to that violation (in Lyons, the defendant city's police officers' use of control holds during arrest; and in O'Shea, the defendant county magistrate and circuit court judge's setting of bond, sentencing and jury fee-setting), they would subject the plaintiffs to the allegedly unconstitutional practices. No such remote and unlikely contingencies exist here, where the plaintiffs allege that they, by pursuing the very activities upon which their careers or businesses are based, will act in a manner that subjects them to prosecution under the allegedly unconstitutional statutes. Unlike the plaintiff in Lyons, the plaintiffs here need not base the threat of a potential justiciable injury on "incredible assertion[s]" regarding the conduct of third parties. 461 U.S. at 105-06, 103 S.Ct. at 1667.

Having found that the plaintiffs have alleged a sufficiently credible threat of injury to confer standing upon them, the court must next address the other, more straightforward challenges to the plaintiffs' standing raised by the attorney general defendants. As stated, the attorney general defendants assert that, with respect to the post-viability abortion statute, none of the plaintiffs can satisfy the case-or-controversy requirement because they do not perform the proscribed types of abortion procedures. In support of this argument, the attorney general defendants place great emphasis on the Sixth Circuit's decision in Akron Ctr. for Reproductive Health, Inc. v. City of Akron, 651 F.2d

1198 (6th Cir.1981), rev'd in part on other grounds, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), which concerned a statute, like the post-viability abortion statute at issue here, that proscribed abortions after "viability," except where necessary to prevent impairment of the pregnant woman's health or her death. The Akron ordinance, however, unlike the statute addressed here, established a presumption of viability at 24 weeks after lmp (that is, the start of the third trimester of pregnancy) Akron Ctr. for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1185 (N.D.Ohio 1979). The Sixth Circuit affirmed the district court's holding that physician-plaintiffs who were not performing abortions beyond the first trimester (which ends at approximately 12 weeks after lmp), and who expressed no intention to perform such abortions, lacked standing in their own right to challenge the ordinance at issue. Akron, 651 F.2d at 1210-11. Moreover, the court rejected the plaintiffs' argument that they enjoyed third-party standing on behalf of those patients they counseled regarding post-first trimester abortions, again because they entertained no intent to themselves perform the abortions. Id.

Plainly, the Akron court's holding was a consequence of the undisputed fact that abortions carried out before the end of the first trimester, which constituted the limit beyond which the Akron plaintiffs did not perform abortions, take place well before the presumptive point (the start of the third trimester) at which the city ordinance proscribed abortion procedures. Here, by contrast, Alabama's post-viability abortion statute, while prohibiting all abortions performed after the fetus has reached "viability," does not explicitly define that critical juncture in terms of a point in time, nor does it set forth a presumption regarding when viability commences. Rather, the act defines "viable and viability" broadly as follows:

> "The stage of fetal development when, in the judgment of the physician based upon the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support."

1975 Ala.Code § 26-22-2(9) (Law.Co-op.Supp.1997). Additionally, Alabama's post-viability abortion statute, unlike the Akron ordinance, prescribes viability testing prior to abortions that are performed after 19 weeks of pregnancy. § 26-22-4.

As the attorney general defendants concede, plaintiffs Summit Medical and Dr. Knorr have alleged that they perform abortions as late as 24 weeks lmp. Thus, they would be required under the act to comply with the viability- testing strictures prior to performing certain abortions, and would be forbidden to pursue abortions where the tests indicated fetal viability.[8] Thus, these plaintiffs are unquestionably subject to the express language of the act, and therefore have standing to challenge it.

Moreover, on the record before it the court cannot conclude that the late- second-trimester abortions performed by all plaintiffs would fall outside the act's definition of post-viability abortions.[9] The plaintiffs aver that the act's definition of viability is so broad that it could be interpreted to encompass these late-term abortions. Unlike the ordinance considered by the court in Akron, Alabama's post-viability abortion statute does not employ a presumptive date for the existence of a viable fetus, and so the court is unable to conclude

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[8]The attorney general defendants urge the court to conclude that these plaintiffs do not in fact perform the proscribed post-viability abortions, because the plaintiffs themselves define viability as commencing at approximately 24 to 28 weeks lmp. The court declines this invitation. How the plaintiffs define viability in their pleadings is immaterial; rather, in deciding this motion to dismiss, the court must examine the act and determine whether it could reasonably be construed to encompass the conduct engaged in by the plaintiffs, irrespective of how the parties interpret the relevant provisions.

[9]According to the plaintiffs' pleadings, plaintiff Beacon Women's Center provides abortions up to 18 weeks lmp, and plaintiff New Women, All Women Health Care provides abortions through 20 weeks lmp.

definitively that abortions performed by any of the plaintiffs fall outside of the range of abortions proscribed by the act. Thus, the court finds that all plaintiffs have presented allegations sufficient to establish that they could be subject to the criminal sanctions imposed by the post-viability abortion statute for certain abortions that they perform. [10]

In their final standing volley, the attorney general defendants contend that none of the medical clinic plaintiffs has standing to challenge the partial-birth abortion statute because the statute, by its express terms, imposes criminal or civil liability only upon "physicians" or "any other individuals," and does not encompass such entities as hospitals or clinics. The court does not need to reach the merits of this argument, however, because it is not disputed that one of the named plaintiffs, Dr. Knorr, is indeed a "physician" who risks criminal and civil liability for performing abortion operations proscribed by the partial-birth abortion statute. Because Dr. Knorr has standing to pursue the full extent of the plaintiffs' claims directed to that act, the court may exercise jurisdiction over these claims, and need not ascertain whether the other plaintiffs also have standing. See Carey v. Population Services, Intern., 431 U.S. 678, 682, 97 S.Ct. 2010, 2014, 52 L.Ed.2d 675 (1977) (determination that

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[10]The attorney general defendants also complain that defendant Ellen Brooks, the Montgomery County district attorney, is not a proper party to this lawsuit because the only plaintiff abortion provider located within Montgomery County, Beacon Women's Center, does not perform the procedures proscribed by either statute. However, for the reasons provided above, the court has concluded that Beacon Women's Center does have standing to sue here in view of the plaintiffs' allegations that the statutes' broad definitions of the proscribed procedures could encompass abortions performed by Beacon Women's Center and the other plaintiff abortion providers. Thus, the court rejects the attorney general defendants' contention, at the motion-to-dismiss stage, that Brooks is not a proper party to this lawsuit. If, at a later juncture in this lawsuit, the attorney general defendants can proffer facts establishing that Brooks should be dismissed from this suit, the court would of course revisit this issue.

at least one plaintiff has standing to challenge all aspects of asserted claims obviates need to determine standing of other plaintiffs); see also Planned Parenthood Ass'n v. Miller, 934 F.2d 1462, 1464-66 n. 2 (11th Cir.1991). [11]

For the foregoing reasons, the court concludes that the plaintiffs have satisfied the standing component of the case-or-controversy requirement. However, before it may put aside its copy of Article III, the court must address another aspect of the case-or-controversy requirement, namely whether the plaintiffs' claims have been rendered moot by the attorney general's letter to the four district attorneys regarding enforcement of the partial-birth abortion statute. This issue is taken up in the following section.

ii. Mootness

As a threshold matter, the court notes that the mootness contention is limited to the plaintiffs' claims concerning the partial-birth abortion statute, because the attorney general's directive expressly pertained only to that statute. Nothing in the record indicates that the attorney general has placed any limitation on the enforcement of the post-viability abortion statute.

The plaintiffs aptly analogize the mootness issue presented here to claims of mootness grounded on a defendant's "voluntary cessation" of challenged conduct. The analogy fits because, as explained below, there is no evidence to suggest that the attorney general's letter can be deemed binding for all time and for all possible future prosecutions under the statute. Rather, the letter is more accurately construed as an expression of the attorney general's current, but readily alterable, position.

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[11]The plaintiffs contend that under Alabama criminal law pertaining to corporate and accomplice liability principles, the clinics would indeed be exposed to criminal liability for the acts of the physicians and other medical personnel under their employ. As stated, however, the court will not address these arguments because Dr. Knorr, as an individual physician, enjoys standing to sue.

The Supreme Court has emphasized the stringency of the test for mootness under such circumstances, in recognition of the fact that "the defendant is free to return to his old ways." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n. 10, 102 S.Ct. 1070, 1074 & n. 10, 71 L.Ed.2d 152 (1982); United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); see also Secretary of Labor v. Burger King Corp., 955 F.2d 681, 684 (11th Cir.1992). Thus, a case may be moot only if it becomes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-204, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968). The "heavy burden" to make this showing rests squarely on the defendants' shoulders. See Burger King, 955 F.2d at 684. At least one court has held that the voluntary cessation must be legally binding and judicially enforceable. See Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 563 (2d. Cir.) (holding that the defendant's mere promise to abstain from the challenged action, in the absence of a binding settlement or other judicially- enforceable agreement, does not render the controversy moot), cert. denied, 501 U.S. 1218, 111 S.Ct. 2829, 115 L.Ed.2d 998 (1991).

On the record before it, the court concludes that the attorney general defendants have failed to meet their heavy burden of establishing that the voluntary decision to place limitations on prosecutions under the partial-birth abortion statute is permanent. Nothing in the record persuades the court that the letter, even if it is binding on the district attorneys to whom it was addressed, is not subject to revision or rescission at the attorney general's sole discretion. In the letter itself, the attorney general stated that he relied upon 1975 Ala.Code § 36-15-14 (Michie 1991) in instructing the district attorneys regarding how the partial-birth abortion statute was to be construed for enforcement purposes. That provision provides in pertinent part as follows: "The attorney general ... may at any time he sees proper, either before or after indictment, superintend and direct the prosecution of

any criminal case in any of the courts of this state."[12] As counsel for the attorney general defendants conceded during the hearing held regarding the pending motion to dismiss, this provision does not bind the current attorney general, nor any of his successor attorneys general, to the construction of the statute set forth in the letter. Thus, the attorney general is free to change his mind at any time regarding how the statute is to be construed for purposes of prosecuting potential violators.

The court's conclusion that the attorney general's letter is not a binding interpretation of the statute, but is simply a non-binding statement of his present intent not to prosecute pre-viability abortions under the act, is further reinforced by an additional concession made by the attorney general at the hearing. Specifically, the attorney general acknowledged that the letter would not preclude the state from bringing prosecutions in the future against physicians who had performed pre-viability abortions even while the attorney general's letter was in force. In other words, the attorney general was not only unwilling to state that pre-viability partial-birth abortions performed some time in the future would not be subject to prosecution, but he also refused to rule out the possibility that physicians risked future prosecution for performing abortions that appeared, in view of the opinion letter, to be lawful at the time they were performed. If the opinion letter were in fact a binding

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[12]A second provision of the 1975 Alabama Code, § 36-15-15 (Michie 1991), provides that the attorney general "shall give the district attorneys of the several circuits any opinion, instruction or advice necessary or proper to aid them in the proper discharge of their duties, either by circular or personal letter." The plaintiffs contend that this provision is the actual authority under which the attorney general instructed the district attorneys regarding the interpretation of the partial-birth abortion statute. Whether this contention is correct or not is immaterial for purposes of deciding the mootness question, however, because this provision, like § 36-15-14, does not render the attorney general's construction of the statute binding on him or his successors, who are free to revise or rescind their interpretation at any time.

interpretation of the statute, such prosecutions would not be possible, and physicians could rest assured that performance of pre-viability partial- birth abortion procedures would not subject them to prosecution if performed while the letter is in force.

Under these circumstances, it simply is not "absolutely clear" that the allegedly unconstitutional enforcement of the partial-birth abortion act could not reasonably be expected to take place some time in the future, and the court therefore concludes that the plaintiffs' claims have not been rendered moot by the attorney general's letter. See Concentrated Phosphate, 393 U.S. at 203- 204, 89 S.Ct. at 364.[13]

This conclusion is particularly appropriate in the context of a criminal abortion statute, given the unquestionable political nature of decisions regarding how, when, and against whom to enforce such statutes, as well as the acute sensitivity of these decisions to the force and direction of the prevailing winds of public opinion. In view of these considerations, there is little reason to suspect that the position currently staked out by the state attorney general will not eventually shift, perhaps to one that permits prosecutions to be brought against the plaintiffs who initiated this lawsuit or other physicians who perform similar abortion operations, not only as to future conduct, but even for past conduct that occurred while the present opinion letter was in effect.

This conclusion is not at odds with the decision in Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir.1987),

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[13]The plaintiffs also make much of the fact that the attorney general and the governor have adopted inconsistent positions regarding the appropriate scope of enforcement of the partial-birth abortion act, with Governor James indicating that he intends to enforce it to the fullest possible extent. The court declines to address this argument, however, because it concludes that even in the absence of such a conflict the attorney general's letter constitutes insufficient evidence that the allegedly unconstitutional application of the statute will not be pursued.

where the Eleventh Circuit found that the controversy concerning the defendant city's public display of its seal, which bore the word "Christianity," had been rendered moot by the city's agreement to remove the seal from several prominent locations. The Eleventh Circuit explained its decision by noting that the city had "promised not to display them there in the future," and that there did not appear to be any basis for believing that the city would "break its word." Id. at 693. By contrast, here there is absolutely no indication that the defendants have made any such promises regarding the permanence of the current limitation placed upon prosecutions under the partial-birth abortion act.

Accordingly, the court holds that the plaintiffs have satisfied the requirement imposed by Article III that they present a genuine case or controversy for adjudication by the court. Thus, this court has jurisdiction to hear all of the plaintiffs claims against the defendants. However, before proceeding to the determination of whether the plaintiffs have alleged a claim upon which relief may be granted, the court must determine whether there are sufficient reasons for it to abstain from hearing this lawsuit despite the existence of a jurisdictional basis, as the attorney general defendants contend. The court will address this question of abstention in the following section.

C. Abstention Doctrines

The attorney general defendants argue that this court should abstain from adjudicating the plaintiffs' claims for declaratory and injunctive relief, even though an Article III case or controversy has been presented, on the basis of at least three distinct, but related and somewhat overlapping, doctrines. First, the attorney general defendants seek to invoke the abstention doctrine first articulated in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), which counsels that federal courts should abstain under certain circumstances to avoid interference with state-court proceedings. Second, the attorney general defendants contend that the court should refuse to hear the plaintiffs' claims for equitable relief because they have failed to establish the basic requisites imposed by

courts for the issuance of such relief.[14] Finally, the attorney general defendants rely upon the abstention doctrine most commonly associated with Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), under which federal courts are to refrain from adjudicating constitutional challenges to state action where there are unclear questions of state law that, if resolved by state courts, could obviate the need to decide the constitutional question. The court will address each of these contentions in turn below.

i. Younger Abstention

The first doctrine that the attorney general defendants enlist in their effort to convince the court to abstain from hearing the present lawsuit, which is commonly referred to as Younger abstention,[15] emerged from the Supreme Court's examination of the considerations of equity, comity, and federalism that arise when the federal jurisdiction over a matter could potentially interfere with related state-court proceedings. See Steffel v. Thompson, 415 U.S. 452, 460, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974). Where such interference is a strong possibility, the Supreme Court has commanded federal courts to abstain from hearing the plaintiffs' claims for equitable relief except under "extraordinary circumstances," where the alleged irreparable injury is "both great and immediate." Younger, 401 U.S. at 46, 52, 91 S.Ct. at 751, 755; see also Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972); Ealy v. Littlejohn, 569 F.2d 219, 231 (5th Cir.1978). The attorney general defendants seek to import into this lawsuit these all-but-insurmountable hurdles to the exercise

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[14]Although this equity-based doctrine technically may not be considered an abstention doctrine, the court nevertheless addresses it in this section because the issues raised are closely related to those considered in deciding the Younger and Pullman abstention questions.

[15]Justice Black, writing for the majority in Younger, termed the considerations of comity underlying that decision "Our Federalism." 401 U.S. at 44-45, 91 S.Ct. at 750-51.

of the court's jurisdiction over the plaintiffs' claims, and argue that because the plaintiffs cannot establish that this is an extraordinary case they should be compelled to attempt to vindicate their asserted rights in a state-court proceeding.

The attorney general defendants fail in this effort to smother the plaintiffs' claims for federal declaratory and injunctive relief under the heavy blanket of requirements imposed by the Younger doctrine, however, because they ignore a critical underpinning of the Supreme Court's decision in Younger. Central to that decision was the fact that the Court was presented with a lawsuit in which the sole plaintiff whose claims were reached on the merits sought an injunction to stop a state criminal prosecution that was not merely threatened, but was actually pending against him at the time. The Court held that federal courts should, under ordinary circumstances, refrain from issuing such an injunction against ongoing state criminal proceedings. As the Court explained in Steffel, this holding stemmed from its recognition that such proceedings, "in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the constitution of the United States." 415 U.S. at 460-461, 94 S.Ct. at 1216 (internal quotation marks and citation omitted).

As the Supreme Court has emphasized in its post-Younger decisions, that case and its progeny "were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding." Lake Carriers' Ass'n, 406 U.S. at 509, 92 S.Ct. at 1757. The Court has further explained: "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the

federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." Steffel, 415 U.S. at 462, 94 S.Ct. at 1217.

Thus, where, as here, the plaintiffs do not seek declaratory or injunctive relief against an ongoing state criminal prosecution, the heightened requirements imposed by Younger for the exercise of federal court jurisdiction over the plaintiffs' claims for equitable relief are not triggered. Instead, as the Court explained in Lake Carriers' Ass'n, absent a pending state prosecution, "exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met." 406 U.S. at 509-10, 92 S.Ct. at 1757. The court will address the question of whether the plaintiffs have satisfied these conditions below.

The attorney general defendants also point to Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926), upon which the Supreme Court placed heavy reliance in Younger, in support of their contention that this court should abstain from hearing the plaintiffs' claims.[16] Fenner, unlike Younger, but like the instant dispute, did concern an attempt to obtain federal injunctive relief against a state criminal prosecution prior to its initiation. In expansive language seemingly applicable--and possibly fatal--to this action, the Court noted that:

"Ex parte Young and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary

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[16]In fact, Fenner was the source of the great and immediate' irreparable injury standard adopted by the Court in Younger. See Younger, 401 U.S. at 45, 91 S.Ct. at 751.

circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court."

Fenner, 271 U.S. at 243-44, 46 S.Ct. at 493.

Thus, Fenner appears, at first blush, to mandate that the court exercise its jurisdiction over the plaintiffs' claims here only if the heightened, Younger-type standards are satisfied--that is, if the plaintiffs have presented an "extraordinary case" involving a great and immediate danger of irreparable loss. However, the Supreme Court has explained that Fenner applies "in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution for past conduct." Steffel, 415 U.S. at 463 n. 12, 94 S.Ct. at 1218 n. 12 (emphasis in original). Where the plaintiffs' potential liability under the criminal statute stems from acts that have already occurred, then, the Supreme Court will find, in the ordinary case, that the equity and comity based considerations disfavor the exercise of federal jurisdiction over the plaintiffs' claims for declaratory and injunctive relief. The Steffel Court expressly left open the possibility, however, that claims for equitable relief may be heard by federal courts where, "although no prosecution is pending or impending, an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid arrest." Id. (emphasis in original). Thus, the Supreme Court has concluded that potential criminal liability for prospective, as opposed to past, conduct on the part of the plaintiff does not necessarily implicate the comity and equity-based considerations that counsel application of

the stringent Younger and Fenner standards. The instant dispute, in which the plaintiffs' claims for equitable relief explicitly are grounded on their allegations that they must forgo constitutionally protected activity in order to avoid arrest, falls squarely within the realm of cases for which Steffel left open the possibility of federal-court jurisdiction. Accordingly, the court declines the attorney general defendants' invitation to abstain from hearing this action on the basis of the principles enunciated in Fenner, Younger, and their progeny.

ii. Equity Principles

As stated, once the court determines that the plaintiffs' claims have withstood the test imposed by the Younger abstention doctrine, it must next ascertain, based upon the application of traditional equity principles, whether jurisdiction may be exercised over the plaintiffs' requests for equitable relief. See Lake Carriers' Ass'n, 406 U.S. at 509, 92 S.Ct. at 1757 (in the absence of a pending state criminal prosecution, "exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met"); see also Steffel, 415 U.S. at 462, 94 S.Ct. at 1217; Morales v. Trans World Airlines, Inc., 504 U.S. 374, 380-81, 112 S.Ct. 2031, 2035, 119 L.Ed.2d 157 (1992). Here, the plaintiffs seek both a declaratory judgment that the challenged abortion statutes are unconstitutional, and injunctive relief against the defendants to prohibit them from enforcing the statutes. In view of how the treatment by the Supreme Court of these distinct forms of equitable relief has evolved, the court must address them separately.

The question of whether this court may hear the plaintiffs' claims for declaratory relief is quickly resolved by reference to the Supreme Court's decision in Steffel. As noted above, that case concerned a federal lawsuit challenging a state criminal statute that had been initiated prior to the commencement of any state proceedings against the plaintiff. Observing that the principles of comity, equity, and federalism underlying Younger and its progeny had little force in such a context, and expressly reserving for another day the question of whether federal injunctive relief may be granted, the Court

did hold that federal declaratory relief was available under such circumstances. Steffel, 415 U.S. at 460-475, 94 S.Ct. at 1216-24. To be eligible for declaratory relief, the Court held, a plaintiff must demonstrate that he or she faces a genuine threat of enforcement of the challenged state criminal statute. Id. at 475-76, 94 S.Ct. at 1223-24.

As previously noted, no criminal or civil proceedings in state court have been initiated against the plaintiffs here on the basis of the two disputed abortion statutes, but the plaintiffs have indeed established the existence of a genuine threat of such enforcement. Accordingly, the court concludes that it may exercise jurisdiction over the plaintiffs' claims for declaratory relief in view of Steffel.

Whether the court should also adjudicate the plaintiffs' claims for injunctive relief presents a substantially less straight forward question. Because, as noted, Steffel left this question unanswered, its resolution requires an examination of subsequent Supreme Court decisions.

The former Fifth Circuit Court of Appeals undertook just such an examination in Ealy v. Littlejohn, 569 F.2d 219 (5th Cir.1978).[17] Specifically, the court reviewed two post-Steffel decisions of the Supreme Court, Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), which addressed whether the issuance of a preliminary injunction is barred by the equitable considerations underlying Younger, and Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), which addressed the same question regarding a permanent injunction. The former Fifth Circuit concluded on the basis of these decisions that Younger does not preclude the granting of federal injunctive relief provided the plaintiff can clear the following hurdles: (1) satisfaction of the requirements of federal jurisdiction; (2) demonstration of the existence of "exceptional circumstances"; and (3)

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[17]In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

demonstration that an injunction is necessary for the adequate protection of the plaintiff's constitutional rights. The Supreme Court has explained the fact that plaintiffs seeking injunctive, as opposed to declaratory, relief must overcome these additional barriers as follows: "although [o]rdinarily ... the practical effect of injunctive and declaratory relief will be virtually identical, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." Wooley, 430 U.S. at 711, 97 S.Ct. at 1433-34 (internal quotation marks and citations omitted).[18]

Because this court has already determined that the plaintiffs here have satisfied all other federal jurisdictional requirements for their claims for permanent injunctive relief, only the second and third showings described in Ealy remain at issue. While the intended meaning of "exceptional circumstances," as employed in the second requirement, is far from crystal clear, it does appear to erect a rather high barrier to the issuance of federal injunctive relief.[19] For

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[18]In Doran, the Supreme Court held that preliminary, as opposed to permanent, injunctive relief may be awarded even absent satisfaction of the stringent Younger standards. 422 U.S. at 930, 95 S.Ct. at 2567.

[19]The relationship, in terms of relative stringency, of the 'exceptional circumstances' benchmark applicable here, and the 'extraordinary circumstances' standard enunciated in Fenner and Younger, is all but impossible to ascertain. The court does note, however, that Wooley derived the 'exceptional circumstances' formula from Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935), one of the decisions that the Court cited in Younger to justify its adoption of the 'extraordinary circumstances' standard it established for cases involving pending state prosecutions. See Younger, 401 U.S. at 45-46, 91 S.Ct. at 751. Thus, it is difficult to conclude that the two standards are anything but equivalent. If this is true, then Younger is far from moribund in the context of pre- enforcement challenges to state criminal statutes, where injunctive, rather than mere declaratory, relief is sought. The Court in Wooley appeared to say as much, when it

instance, in Wooley, the Court found that three successive prosecutions of the plaintiff in five weeks, with the threat of repeated prosecutions in the future against both him and his wife, satisfied this requirement and justified federal injunctive relief. 430 U.S. at 712, 97 S.Ct. at 1434. The Court intimated that a single threatened prosecution, absent earlier proceedings brought against the plaintiffs under the same disputed statute, will not constitute "extraordinary circumstances," stating that the scenario presented in Wooley "is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time." Id.; see Spencer v. Honorable Justices of Supreme Court of Pa., 579 F.Supp. 880, 892-93 (E.D.Pa.1984) (finding no exceptional circumstances because plaintiff faced only his first threat of prosecution under the challenged provision of the Pennsylvania Code of Professional Responsibility), aff'd, 760 F.2d 261 (3d Cir.1985) (table).

Because there is no prior record of prosecutions brought against any of the plaintiffs under the two challenged Alabama abortion statutes, and in view of the fact that the court sees no reason to question the soundness here of the Supreme Court's observation that a federal plaintiff's interest can be protected by issuance of a declaratory judgment alone, the court concludes that the requisite "exceptional circumstances" are not present. Accordingly, the court will refrain from hearing the plaintiffs' claims for injunctive relief, but will exercise jurisdiction over this lawsuit only to the extent that the plaintiffs seek a declaratory judgment that the two abortion statutes are unconstitutional.[20]

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noted that "generally a court will not enjoin the enforcement of a criminal statute even though unconstitutional, since such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of Younger." 430 U.S. at 711-12, 97 S.Ct. at 1434 (citations and internal quotation marks omitted).

[20]The court recognizes that the question of whether to abstain from hearing the plaintiffs' claims for injunctive relief and the question of whether such relief should be granted are distinct, and that the latter inquiry requires that the court reach the merits

iii. Pullman Abstention

In their final effort to convince the court to abstain from hearing the plaintiffs' claims, the attorney general defendants invoke the Pullman doctrine, which counsels abstention if "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). The Supreme Court has cautioned that such abstention is to be exercised "only in narrowly limited 'special circumstances' where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." Kusper v. Pontikes, 414 U.S. 51, 54, 94 S.Ct. 303, 306, 38 L.Ed.2d 260 (1973); see also Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306, 99 S.Ct. 2301, 2312-13, 60 L.Ed.2d 895 (1979) (such abstention "may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.' ") (quoting Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965)).

Thus, two requirements must be met for Pullman abstention to apply: (1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised. Palmer v. Jackson, 617 F.2d 424, 428 (5th Cir.1980); see also High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir.1980) (noting that the court should also consider "whether a federal decision could later conflict with subsequent state court resolutions

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of the plaintiffs' claims. See Lake Carriers' Ass'n, 406 U.S. at 509 n. 13, 92 S.Ct. at 1756 n. 13 (noting that the two inquiries are distinct); see also Polykoff v. Collins, 816 F.2d 1326, 1333 (9th Cir.1987). However, because the court has concluded that, under the pertinent Supreme Court and former Fifth Circuit authorities, the plaintiffs' have failed to overcome the threshold abstention impediments to exercise of the court's jurisdiction over their claims for injunctive relief, the merits of these claims need not be reached.

concerning the same regulatory program or scheme, thus engendering more confusion"). It is important to note, however, that abstention is not to be applied merely to permit the state courts to adjudicate the constitutionality of the state statute on the basis of federal constitutional law. Duke v. James, 713 F.2d 1506, 1510 (11th Cir.1983).

Here the plaintiffs contend, among other things, that the challenged abortion statutes are unconstitutionally vague.[21] This, of course, raises a question of unclear state law, and thus militates in favor of abstention by this court to permit the Alabama courts to clarify the meaning of the statutes. However, as is characteristic of all the abstention doctrines addressed here, the analysis is not so straightforward, for "not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention." Procunier v. Martinez, 416 U.S. 396, 401, 94 S.Ct. 1800, 1805, 40 L.Ed.2d 224 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

As the Court explained in Procunier, two kinds of vagueness attacks must be distinguished for purposes of determining whether Pullman abstention is appropriate. "Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. [Baggett v. Bullitt, 377 U.S. 360, 376-77, 84 S.Ct. 1316, 1325-26, 12 L.Ed.2d 377 (1964)]. Abstention is therefore appropriate." Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805- 06 n. 5. However, "[w]here ... the statute or regulation is challenged as vague because individuals to whom it plainly apples simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague

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[21]The plaintiffs' other challenges to the constitutionality of the two abortion statutes do not implicate the concerns underlying the Pullman doctrine, because they simply question whether application of the disputed, but clear and unambiguous, provisions would violate the constitution.

terms, abstention is not required. [Baggett, 377 U.S.] at 378, 84 S.Ct. at 1326. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require 'extensive adjudications, under the impact of a variety of factual situations,' to bring the challenged statute or regulation 'within the bounds of permissible constitutional certainty.' Ibid." Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805-06 n. 5.

Here, the plaintiffs level six separate vagueness challenges against the two abortion statutes. With respect to the partial-birth abortion statute, the plaintiffs contend the following: (1) that the definition of a partial-birth abortion provided in the statute, as one "in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," is unconstitutionally vague as to which types of abortion procedures it describes; and (2) that this definition is also unconstitutionally vague as to what is meant by a "living fetus." With respect to the post-viability abortion statute, the plaintiffs make the following vagueness allegations: (1) that the statute is unconstitutionally vague because its exception for cases in which abortions are medically necessary imposes both "objective" and "subjective" standards on physicians' determination of medical necessity; (2) that the statute is unconstitutionally vague because physicians' determinations of whether a medical emergency prevents compliance with several procedural requirements are also governed by a dual "objective" and "subjective" standard; (3) that the statute is also unconstitutionally vague because it employs both "objective" and "subjective" standards for determining whether a fetus is viable; and (4) that the statute is also unconstitutionally vague in mandating viability testing after "19 weeks of pregnancy" without providing a clear and unambiguous methodology for measuring fetal age.[22]

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[22]Although the precise nature of this fourth challenge to the post- viability abortion statute is unclear, it appears to be premised on the inclusion in the post-viability abortion statute of at least two methodologies for calculating fetal age for purposes of determining when viability testing is required under § 26-22-4,

First, regarding the two vagueness challenges against the partial-birth abortion statute and the fourth vagueness challenge to the post-viability abortion statute, the court concludes that the interpretive issues, which underlie the challenges, should be certified to the Alabama Supreme Court pursuant to Rule 18 of the Alabama Rules of Appellate Procedure,[23] with the result that the need for abstention, or

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which mandates such testing prior to performing an abortion after the woman's "first 19 weeks of pregnancy." Specifically, the plaintiffs point to the allegedly contradictory benchmarks provided in § 26-22-2(3), which defines "Gestational age" as "The age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman," and in § 26-22-2(7), which defines "Pregnant" as a condition that "commences with fertilization." According to the plaintiffs, these distinct measurements may differ by as many as two weeks. Apparently because the terms "pregnancy" and "gestation" are roughly synonymous, see Webster's Third New International Dictionary 952, 1788 (1976) (defining the two terms as synonyms), the plaintiffs contend that either of these two possible measurements of fetal age may reasonably be employed for purposes of § 26-22-4, which refers to "pregnancy" without explicitly stating when this condition commences, but that the statute fails to specify which is to be used.

In addition, to further complicate matters, it appears that this fourth challenge to the post-viability abortion statute is not actually alleged in the plaintiffs' complaint. Although the defendants have not taken issue with this omission, the plaintiffs should still amend their complaint, within 14 days, to state this challenge in clear terms.

[23]Rule 18 of the Alabama Rules of Appellate Procedure provides, in pertinent part, as follows:

"When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the

more appropriately, deferral, under the Pullman doctrine is pretermitted.[24] Were the Alabama Supreme Court to construe the term "living" to refer to a "viable" fetus, the constitutional questions raised by the plaintiffs' claims would differ substantially from those that would arise if "living" were defined as containing any living tissue or cells, and either interpretation would clarify the nature of the proscribed conduct. Indeed, at the hearing on the defendants' motions, the plaintiffs conceded that such a construction would moot this part of their vagueness challenges. Similar clarification would result from a declaration by the State Supreme Court as to which specific abortion techniques (e.g., traditional and intact dilation and evacuation, etc.) are proscribed by the act because the physician performs the abortion by "partially vaginally deliver[ing] a living fetus before killing the fetus and completing the delivery," as specified in § 26-23-2(3) of the statute. Finally, with regard to the plaintiffs' fourth challenge to the post-viability abortion statute, which mandates a viability test where the woman is past "her first 19 weeks of pregnancy," should the Alabama Supreme Court determine that the requisite measurement of fetal age commences with fertilization under the statutory scheme, and not the first day of the woman's lmp, the statute would be sufficiently clarified to extinguish another of the plaintiffs'

Supreme Court of this State, by written opinion, may answer."

Pursuant to this provision, federal district courts may certify questions to the Alabama Supreme Court. See, e.g., Tectonics, Inc. v. Castle Const. Co., 496 So.2d 704 (Ala.1986) (Alabama Supreme Court answers question certified by this court).

[24]In Growe v. Emison, 507 U.S. 25, 32 n. 1, 113 S.Ct. 1075, 1080 n. 1, 122 L.Ed.2d 388 (1993), the Supreme Court wrote: "To bring out more clearly ... the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of Pullman 'deferral.' Pullman deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute....". Certification to the Alabama Supreme Court of these questions is tantamount to Pullman deferral of the claims in which the questions are presented.

vagueness claims. By pursuing this course of action, the court heeds the counsel of the unanimous Supreme Court in Arizonans for Official English v. Arizona, --- U.S. ----, ----, 117 S.Ct. 1055, 1072-73, 137 L.Ed.2d 170 (1997), where the Court observed that certification to the state's highest court will succeed in "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."

However, the court concludes that it should neither certify to the Alabama Supreme Court, nor abstain from hearing, under Baggett and Procunier, the plaintiffs' vagueness challenges against the post-viability abortion statute that are premised on the alleged imposition of mixed subjective and objective standards on physicians' conduct (challenges (1) through (3) above). These challenges are not directed to provisions that are susceptible to a reasonable limiting construction by the Alabama courts that would obviate or substantially modify this court's adjudication of the constitutionality of the disputed provisions. Instead, as was the case in Procunier, these provisions are challenged as vague because individuals to whom they plainly apply--physicians who perform abortions on potentially viable fetuses--cannot understand with certainty the nature of the proscribed conduct, and they do not intend to forswear all constitutionally-protected activity arguably within the scope of the vague terms. See Procunier, 416 U.S. at 401 n. 5, 94 S.Ct. at 1805 n. 5. Moreover, given the complexity of the alleged infirmities in the challenged provisions, and the myriad potential factual settings in which problems of vague application of the statute may arise, the court finds, as was also true in Procunier, that no single adjudication by a state court could eliminate the constitutional difficulty, but rather that "extensive adjudications, under the impact of a variety of factual situations" would be required to draw the statute "within the bounds of permissible constitutional certainty." See id. The accuracy of this observation is confirmed below when the court grapples with the question of whether these vagueness challenges state a claim upon which relief may be granted.

For the foregoing reasons, the court finds that it has jurisdiction to hear all of the plaintiffs' claims, to the extent

that they seek declaratory, as opposed to injunctive, relief. The court will, however, refrain from hearing the three vagueness challenges described above until the Alabama Supreme Court has an opportunity to construe the pertinent provisions of the challenged acts, pursuant to the questions certified by this court.[25]

Accordingly, in the remaining sections of this memorandum opinion the court will address the question of whether dismissal of the lawsuit is required because, as the defendants contend, the plaintiffs have failed to state any claim upon which relief may be granted.

V.ATTORNEY GENERAL DEFENDANTS' CONTENTIONS THAT PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

As stated, in considering a defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the court accepts the plaintiff's factual allegations as true, and the action may not be dismissed unless it appears to a certainty that the plaintiff can offer no set of facts supporting the relief requested.

The attorney general defendants attack the following vagueness allegations made by the plaintiffs as failing to state a claim upon which relief can be granted: (1) that the partial-birth abortion statute is unconstitutionally vague as to which abortion procedures fall within its definition of a "partial- birth" abortion; (2) that the partial-birth abortion statute is unconstitutionally vague as to what is meant by the term "living fetus;" and (3) that the post-viability abortion statute is unconstitutionally vague as to how physicians are to determine (a) whether a fetus is viable, (b) whether an abortion is necessary to prevent the death of the woman or the substantial and irreversible impairment of her health, (c) whether a medical emergency prevents compliance with the statute's procedural requirements for conducting and documenting the abortion, and (d) whether the abortion takes

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[25]See supra note 24.

place after "19 weeks of pregnancy," for purposes of ascertaining whether viability testing is required. With the exception of allegations (1), (2) and (3)(d), the determination of which will be postponed pending the Alabama Supreme Court's interpretation of the pertinent statutory provisions, the court will address whether the plaintiffs have succeeded in stating a claim regarding each of these allegations.

In addition to the foregoing vagueness challenges, the attorney general defendants also contend that the following allegations fail to state a claim: (1) that the partial-birth abortion statute unconstitutionally imposes an undue burden on women seeking pre-viability abortions, to the extent that it prohibits the most common and safest abortion procedures, and to the extent that it imposes a substantial obstacle on women's choice of abortion method; (2) that the partial-birth abortion statute is unconstitutional even if limited to post-viability abortions because it lacks any exception for preserving maternal health; (3) that the partial-birth abortion statute is unconstitutional because its civil liability provisions impose an undue burden on women seeking pre-viability abortions; and (4) that the post-viability abortion statute is unconstitutional because it impermissibly forces a "trade- off" between the woman's health and fetal survival, and fails to ensure that maternal health remains the physician's paramount concern.[26] The court will address whether each of these allegations survives the attorney general defendants' motion to dismiss as well.

A. Alleged Vagueness of the Post-Viability Abortion Statute

i. Legal Standard for Determining Vagueness

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[26]The attorney general defendants apparently do not contend that the plaintiffs have failed to state claims upon which relief may be granted as to the following two allegations in the complaint: (1) that both statutes violate the equal protection clause, and (2) that the partial-birth abortion statute interferes with a woman's right to determine the course of her medical treatment, and therefore violates her right to bodily integrity. Consequently, these claims are not addressed in this memorandum opinion.

The plaintiffs correctly observe that the due process clause of the fourteenth amendment has been construed to prohibit laws sufficiently vague that "persons of common intelligence must necessarily guess at [the laws'] meaning and differ as to [the laws'] application." Smith v. Goguen, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 1247 n. 8, 39 L.Ed.2d 605 (1974). Thus, a vague law is unconstitutionally flawed both because it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and because the law's lack of explicit instructions to those who enforce it "impermissibly delegate[s] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); see also High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228-29 (11th Cir.1982).

Moreover, the peril inherent in a vague statute is amplified where, as is alleged here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (invalidating a state abortion statute on vagueness grounds). These concerns are especially significant where those who run afoul of the statute face criminal penalties. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. Hoffman Estates. Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

The attorney general defendants do not contest the applicability of the foregoing principles to the instant dispute. However, the parties part company over the requisite showing that challengers of a statute must make to establish unconstitutional vagueness. The plaintiffs, relying upon the Supreme Court's decisions in Kolender v. Lawson, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983), and Colautti, argue that where the disputed law criminalizes constitutionally protected conduct it should be held vague on its face "even when it could conceivably have had some valid application." The attorney general defendants disagree that this relatively permissive standard governs the inquiry, and instead urge the court to adopt the significantly more

restrictive standard articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), and applied to the abortion context in Webster v. Reproductive Health Servs., 492 U.S. 490, 524, 109 S.Ct. 3040, 3060, 106 L.Ed.2d 410 (1989) (O'Connor, J., concurring), which requires that the plaintiff establish "that no set of circumstances exists under which the Act would be valid." Thus, the attorney general defendants urge the court to dismiss the plaintiffs' vagueness challenges unless they have alleged facts demonstrating that the disputed statute would be vague in all its possible applications.

The court does recognize that substantial disagreement exists among the Federal Courts of Appeals regarding whether the Salerno benchmark for facial challenges to the constitutionality of statutes still governs the analysis in the abortion context in the wake of Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).[27] In fact, the court will be called upon to examine this very issue in addressing the plaintiffs' contentions that the partial-birth abortion statute imposes an undue burden on pregnant women who seek an abortion, and that the post-viability abortion statute imposes an unconstitutional "trade-off" between maternal health and fetal survival. However, the court sees no reason why Salerno should play any role in a facial challenge to an allegedly "vague" act, as opposed to similar attacks grounded upon an act's alleged "overbreadth."[28] In Salerno itself, the Supreme

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[27]The attorney general defendants correctly characterize the plaintiffs' vagueness claims as "facial," as opposed to as applied, because the plaintiffs allege that the statutes are vague on their very face (that is, as written they would not be clear to the reader), rather than as specifically applied to their conduct. See Posters 'N' Things, Ltd. v. U.S., 511 U.S. 513, 525, 114 S.Ct. 1747, 1754, 128 L.Ed.2d 539 (1994) (addressing allegation of vagueness as applied to a criminal defendant); see also Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 193-94 (6th Cir.1997) (discussing the distinction between facial and as-applied challenges generally).

[28]In facial challenges to the alleged overbreadth of a statute,

Court indicated that the restrictive standard was specifically directed to facial challenges in which problems of "overbreadth" were alleged: "The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745, 107 S.Ct. at 2100. See also Evans v. Kelley, 977 F.Supp. 1283, 1309 n. 27 (E.D.Mich.1997) (rejecting, in the context of a challenge to an abortion statute, an argument that the Salerno standard applies to "void-for- vagueness" claims).

Moreover, the court notes that, while the Supreme Court has on occasion stated that, in most circumstances, to succeed on a facial void-for- vagueness challenge "the complainant must demonstrate that the law is impermissibly vague in all its applications," it has also recognized that "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement depends in part on the nature of the enactment." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-98, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In fact, the Court has opined that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Id. at 499, 102 S.Ct. at 1193. These principles are of course consistent with the Court's teaching in Kolender and Colautti that a criminal statute

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which most frequently arise in the free speech context, the plaintiff contends that the enactment, even if it permissibly regulates certain conduct, "sweeps too broadly, penalizing a substantial amount" of constitutionally- protected conduct. Forsyth County v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992); see also Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The vagueness challenges at issue here, however, are distinct from such claims of unconstitutional overbreadth, although overbreadth implications may be drawn from allegations in the complaint that the partial-birth abortion statute may be construed to prohibit certain well- established types of abortion procedures performed by the plaintiffs and other abortion-providers.

impinging upon constitutionally-protected conduct should be held vague on its face even when it could conceivably have had some valid application.

Accordingly, the court will apply the less restrictive Kolender/Colautti standard in addressing all of the plaintiffs' vagueness attacks on the post- viability statute, and endeavor to ascertain whether the plaintiffs have alleged facts suggesting that the statute fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108, 92 S.Ct. at 2298-99. If this standard is satisfied, the court will find that the plaintiffs have stated a claim upon which relief may be granted, even if the defendants succeed in establishing that the statute could conceivably have had some valid application.

ii. Application of the Legal Standard to the Plaintiffs' Vagueness Challenges

As stated, the plaintiffs allege that Alabama's post-viability statute is unconstitutionally vague with respect to four separate determinations that it requires physicians to make: (1) the determination as to fetal viability; (2) the determination as to the medical necessity of an abortion to prevent the woman's death or substantial and permanent impairment of her health; (3) the determination as to whether a medical emergency prevents compliance with the statute's procedural requirements; and (4) the determination as to fetal age, for purposes of whether viability testing is required. The court will address the first three of these challenges below, but, as discussed above, will postpone its examination of the fourth claim until after the Alabama Supreme Court has had an opportunity to construe the pertinent provisions of the statute in response to the certified questions from this court.

(a) Vagueness as to Determination of Fetal Viability

The plaintiffs contend that the post-viability abortion statute is unconstitutionally vague in view of the Supreme Court's decision in Colautti, because it imposes both "objective" and "subjective" standards on the requisite

determination of fetal viability. In Colautti, the challenged abortion statute contained a provision that prescribed a standard of care where the person performing an abortion determined that the fetus is viable, or where "there is sufficient reason to believe that the fetus may be viable." 439 U.S. at 391, 99 S.Ct. at 683. The Court found this requirement to be vague and ambiguous in part because it was unclear whether the statute imposed a purely subjective standard, or one that was mixed subjective and objective. The Court concluded that because the determination that the fetus "is viable" was to be based upon the attending physicians' "experience, judgment or professional competence," it was governed by a subjective standard, but it could not ascertain whether the "sufficient reason to believe that the fetus may be viable" language was also to be gauged on a subjective standard, or whether an objective standard was imposed. Id. at 391, 99 S.Ct. at 683.

Relying heavily on Colautti, the plaintiffs here attempt to convince the court that the Alabama post-viability abortion statute is constitutionally infirm because it also employs a vague standard for judging physician conduct. The plaintiffs first point to § 26-22-3 of the act, which forbids abortions "when the unborn child is viable," but recognizes an exception to this proscription where the physician "reasonably believes, after making a determination of the viability of the unborn child in compliance with Section 26-22-4 relating to the determination of viability, that the unborn child is not viable." 1975 Ala.Code § 26-22-3(a) & (b)(2) (Law.Co- op.Supp.1997) (emphasis added). The plaintiffs contend that the "reasonably believes" language imposes both an objective and a subjective standard on physicians. The plaintiffs next direct the court's attention to § 26-22-4 of the act, governing viability testing, which mandates that the physician "determine whether, in his or her good faith medical judgment, the [unborn] child is viable." This provision, according to the plaintiffs, imposes a subjective standard, because the physician is to exercise his or her "good faith" judgment in assessing whether the fetus has reached viability. In light of these two provisions, the plaintiffs argue, the statute imposes a mixed subjective and objective benchmark for judging physicians' conduct regarding the viability determination, and thus it contravenes

the Court's standard set forth in Colautti.

As explained more fully below, the plaintiffs are correct in characterizing the foregoing provisions as imposing a mixed subjective- objective standard on physicians, determinations of fetal viability. However, they misconstrue Colautti when they contend that such a mixed standard is necessarily vague in view of that decision. As discussed above, the provision examined in Colautti was deemed vague because it was impossible to determine the overall standard that governed the determination of fetal viability; that is, the Court could not ascertain whether the statute imposed a purely subjective standard, or one that was both subjective and objective. By no means did the Court indicate that the challenged statute was unconstitutionally vague merely because it imposed a mixed subjective-objective standard. In fact, there is nothing in Colautti to suggest that such a mixed standard, if couched in clear terms, is per se vague, as the plaintiffs appear to contend.

Although it declines to read Colautti as urged by the plaintiffs, the court does agree with their assertion that the Alabama post-viability abortion statute employs a mixed subjective-objective standard to gauge physicians' determination of fetal viability. Inclusion of the term "reasonably" as a modifier of "believes" in § 26-22-3(b)(2) renders the applicable standard both subjective and objective in nature. That is, the test gauges the objective correctness of the physician's subjective understanding of the outcome of the viability determination. Thus, it is clear that the statute imposes a mixed subjective-objective standard on the viability determination: only if the physician believes that the fetus is not viable, and that subjective belief is found to be objectively reasonable, does he or she satisfy the requirements under the statute for performing a post-viability abortion. [29]

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[29]Moreover, the plaintiffs' reference to § 26-22-4 of the statute, which also pertains to the physician's determination of fetal viability, bolsters this conclusion. The court agrees with the plaintiffs that this provision imposes a subjective standard on the physician by requiring that he or she exercise "good faith medical

This conclusion is consistent with the recent decision in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir.1997), in which the Sixth Circuit struck down three major portions of an Ohio act that proscribed and regulated both partial-birth and post-viability abortions. The Voinovich court characterized two provisions in the portion of the statute directed to post-viability abortions as imposing a "dual" subjective-and- objective standard because they called for the physician to make certain determinations "in good faith and in the exercise of reasonable medical judgment" 130 F.3d at 204. The court described these provisions as containing "subjective and objective elements in that a physician must believe that the abortion is necessary and his belief must be objectively reasonable to other physicians." Id.

As discussed above, the court does not agree that Colautti may be read to compel a finding that the mixed standard imposed on physicians by the Alabama post-viability abortion statute is per se unconstitutionally vague. However, because the court agrees with the plaintiffs that the post-viability abortion statute's fetal viability testing requirement imposes a mixed subjective- objective standard on physicians, the analysis is not yet complete. Instead, the court must revisit the Colautti decision to ascertain whether the concerns expressed by the Supreme Court regarding the perils inherent in an objective standard for judging physician's decisions in the abortion context are implicated by the inclusion of an objective component in the Alabama statute's governing standard. Specifically, the question remains whether that objective component renders the act unconstitutionally vague by failing to provide adequate notice to physicians as to when their activities fall within the statute's proscription.

As explained above, the viability-determination provisions challenged in Colautti were held to be unconstitutionally vague because of the uncertainty regarding whether they employed a purely subjective or a mixed

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judgment," and therefore that the physician must subjectively believe that the fetus is not viable.

subjective- objective standard. However, the Court also emphasized that adjudging physician conduct under any standard having an objective component is a perilous enterprise, explaining that such a standard, applied "from the perspective of a cross section of the medical community or a panel of experts ..., obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center." Colautti, 439 U.S. at 391-92, 99 S.Ct. at 684. Additionally, the Court faulted the challenged statute, including the objective component of the standard applied to physicians, for failing to "afford broad discretion to the physician," noting that "Instead, it condition[ed] potential criminal liability on confusing and ambiguous criteria. It therefore present[ed] serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." Id. at 394, 99 S.Ct. at 685.[30]

The court agrees with the plaintiffs that these observations by the Supreme Court strongly suggest that the inclusion of an objective element in the viability-determination provisions of the post-viability abortion statute may render the statute unconstitutionally vague because they could impermissibly stifle physicians' discretion and chill the exercise of constitutional rights. The attorney general defendants counter, however, that any vagueness concerns regarding objective standards expressed by the Court in Colautti are vitiated here because the challenged provisions of the Alabama statute include a mens rea requirement for a finding of liability.[31] In support of this contention, the attorney

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[30]The court recognizes that the Supreme Court reached this conclusion in large part because the nature of the standard applied (purely subjective versus mixed subjective objective) could not be determined with certainty. However, it is also clear that the imposition of an objective test to gauge physician's professional conduct contributed to some degree to this conclusion. See Colautti, 439 U.S. at 391-93, 99 S.Ct. at 683-84.

[31]Inclusion of a mens rea requirement means that the

general defendants cite Colautti itself, as well as earlier Supreme Court decisions holding that mens rea requirements can cure otherwise vague statutes. This argument appears to raise an issue of first impression for the courts: to date, no court has specifically addressed whether an objective component in a standard for judging physician conduct in the abortion arena is constitutional where liability is conditioned on a finding that the physician had the requisite mens rea.[32]

The attorney general defendants are correct to observe that Alabama's post- viability abortion statute conditions liability on a finding that the accused physician satisfies a mens rea requirement. Specifically, the statute provides in § 26-22-3(a) that "no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable."[33] Thus, a physician faces criminal liability

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defendant must have the requisite "guilty mind" or "criminal intent" in order to be convicted under a statute. See Black's Law Dictionary 889 (5th ed.1979) (also defining "mens rea" as "guilty knowledge and willfulness"). The related term "scienter" means "knowingly," and is also frequently used to signify the defendant's "guilty knowledge." See id. at 1207. The court employs these two terms interchangeably in this order.

[32]In Colautti, as explained more fully below, the Court did not specifically address whether a scienter requirement would adequately allay its fears concerning an objective standard for judging physician conduct. See Colautti, 439 U.S. at 396, 99 S.Ct. at 686. Nor did the Sixth Circuit reach this question in Voinovich. See 130 F.3d at 205.

[33]Section 13A-2-2(3) of the Alabama Code defines criminal recklessness as follows:

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation."

under the statute only when he or she intends to perform an abortion involving a viable fetus, knows that he or she is performing such an abortion, or is aware of and consciously disregards the risk that a fetus to be aborted is viable.[34]

The attorney general defendants are also correct to point out that the Court in Colautti expressly stated that the absence of any scienter requirement in the viability-determination provision at issue in that case contributed to the holding that the challenged statute was unconstitutionally vague. See Colautti, 439 U.S. at 397, 99 S.Ct. at 685-86. However, it must be noted that the Colautti Court did not invalidate the disputed statute exclusively on the basis of the absent scienter requirement, but instead merely observed that the vagueness of the statute was "compounded by" its imposition of strict liability. See id. at 394, 99 S.Ct. at 685. In fact, the Court expressly declined to decide whether the statute would have been constitutional had it incorporated such a requirement. See id. at 396, 99 S.Ct. at 686. Nor did the Court state that an otherwise unconstitutionally-vague statute could be saved by an appropriately-drafted scienter requirement. Thus, only by unreasonably over-extending Colautti's holding could one read that decision to require that the Alabama partial-birth abortion statute be found constitutional despite the plaintiffs' vagueness allegations, solely because the statute conditions guilt on a finding of mens rea.

However, despite the fact that Colautti does not compel a holding that the scienter requirement cures any

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1975 Ala.Code. § 13A-2-2(3) (Michie 1994).

[34]Although one could argue that § 26-22-3(a) of the post-viability abortion statute only conditions liability on a finding that the physician had the requisite mens rea regarding the fact that he or she was performing an abortion, and not regarding the viability status of the fetus, the court finds that such an interpretation would effectively drain the scienter requirement of all real meaning, and thus concludes that it is with respect to whether the aborted fetus is viable that the requirement applies.

vagueness in the viability- determination provision at issue here, the court must nonetheless examine the statute to determine whether in view of the Colautti Court's reasoning the requirement would in fact cure the alleged vagueness. As the Colautti Court noted, the Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." 439 U.S. at 395, 99 S.Ct. at 685. The Court has indeed observed that otherwise vague statutes may pass constitutional muster where the legislature has thought to limit liability to situations in which the accused has the requisite mens rea. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); see also Fargo Women's Health Org., v. Schafer, 18 F.3d 526, 534-35 (8th Cir.1994) (court's rejection, in light of Hoffman Estates and Colautti, of a vagueness challenge to an abortion statute based in part upon the existence of a general scienter requirement that the court determined must be imported into the challenged statute); Evans v. Kelley, 977 F.Supp. 1283, 1305-06, 1308-09, 1311 n. 29, & 1319 n. 38 (E.D.Mich.1997) (holding that the absence of any scienter element in a partial-birth abortion statute similar to that at issue here exacerbated the vagueness of the definition of the proscribed procedure).

The rationale underlying these decisions was articulated by the Supreme Court in a seminal decision, Screws v. United States, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945), as follows:

"[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.... The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Similarly, in Boyce Motor Lines v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 331-32, 96 L.Ed. 367 (1952), the Court relied upon this rationale to uphold a statute that conditioned liability on a finding that the accused "knowingly" violated the challenged regulation concerning the transportation of hazardous materials. Once again, the Court emphasized that any alleged vagueness in the prohibition was cured by the inclusion of "culpable intent" as a necessary element in the offense, such that a conviction would only be proper where the violator at the very least "willfully neglected to exercise its duty" under the regulation. id. (emphasis added). Thus, these decisions establish that where an element of bad faith on the part of the accused is required for conviction under an allegedly vague criminal statute, the Supreme Court is loathe to invalidate the statute as vague for failing to provide adequate notice of the proscribed conduct.

The court recognizes that the foregoing decisions concerned statutes that conditioned guilt on a finding that the accused acted with intent or knowledge in violating the pertinent criminal enactment. Under Alabama's post- viability abortion statute, however, a physician need not intentionally or knowingly perform an abortion on a viable fetus to be convicted; instead, pursuant to § 26-22-3(a) of the statute, the lowest level of culpability for which liability may lie is recklessness on the part of the physician. The Supreme Court apparently has not addressed the question of whether a requirement that the accused have a mental state of recklessness, rather than specific intent or knowledge, can cure an otherwise vague statutory standard.

However, at least one appellate court has answered this question in the affirmative. See Einaugler v. Supreme Court, 109 F.3d 836, 842 (2d Cir.1997). In Einaugler, the Second Circuit rejected a habeas corpus petitioner's claim that he was convicted under an unconstitutionally vague statute because, among other reasons, the provisions at issue included a scienter requirement. Specifically, the petitioner, a physician, was convicted under a "reckless endangerment" statute that required proof that he had "recklessly engaged in conduct that created a substantial risk of serious physical injury," and for his behavior to be adjudged reckless, he must

have "grossly deviated from a reasonable person's standard of conduct and consciously disregarded a substantial and unjustifiable risk."[35] See id. at 840. The Second Circuit, citing Hoffman Estates and Colautti, held that the requirement that the petitioner's actions be reckless would mitigate any alleged vagueness in the criminal statute, and noted that he was not "punished under the statute for exercising reasonable medical judgment erroneously," but rather that conviction required "that he was aware that the patient required a course of treatment that he did not provide." Id.

This court agrees with the Einaugler court's conclusion that a scienter requirement of recklessness can, in view of the Supreme Court's jurisprudence on the relationship between mens rea and vagueness, cure an otherwise vague criminal enactment. Here, as was the case in Einaugler, a physician evades punishment under the post-viability abortion statute unless he was aware of, and consciously ignored, a substantial risk that certain circumstances existed. In other words, a physician would not be held strictly liable under the statute merely for erroneously exercising his or her medical judgment; rather, a finding that the physician consciously disregarded a subjectively-known risk that the fetus was viable at the time of the abortion would be necessary to sustain a conviction.

Furthermore, the court holds that the concerns voiced by the Supreme Court in Colautti regarding the hazards imposed by an objective test of physician conduct are largely allayed by the presence of the scienter requirement in the Alabama post-viability abortion statute. Specifically, the Court's overriding concern that such a standard may function as "a trap for those who act in good faith" is obviated by the fact that a conviction under the statute for an erroneous

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[35]Similarly, as stated above, under Alabama's criminal code a person acts recklessly when he or she "is aware of and consciously disregards a substantial and unjustifiable risk ... of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." 1975 Ala.Code § 13A2-2(3) (Michie 1994).

determination of viability requires a measure of bad faith on the physician's part: he or she must know that a substantial and unjustifiable risk exists that the fetus is viable, and must consciously disregard that known risk. Mere good faith, but mistaken, exercise of professional medical judgment would not support a conviction under the statute, and thus the "chilling effect" decried in Colautti is not a legitimate concern here.

Thus, because the court concludes that any alleged vagueness in the post-viability abortion statute's viability determination provisions would be vitiated by the statute's mens rea requirement, the plaintiffs have failed to state a claim upon which relief may be granted concerning the alleged vagueness of these provisions.

(b) Vagueness as to Determination of Necessity to Prevent Woman's Death or Impairment

The plaintiffs also challenge the post-viability abortion statute on the basis of the alleged vagueness of the test it prescribes for physicians to determine whether an otherwise prohibited abortion must be performed to prevent the woman's death or the substantial and irreversible impairment of her health. Specifically, the plaintiffs allege that two provisions of the act pertaining to this determination, like the provisions governing fetal viability discussed above, employ inconsistent objective and subjective standards. The first of these provisions is found in § 26-22-3(b)(1) of the statute, which permits post-viability abortions if the physician performing the abortion "reasonably believes that it is necessary to prevent either the death ... or the substantial and irreversible impairment of a major bodily function of the woman." The plaintiffs allege that use of the term "reasonably believes" in this provision imposes both objective and subjective standards for gauging the physician's determination of medical emergency. The plaintiffs also point to the definition of the term "medical emergency" provided in § 26-22-2(6) of the statute, which reads as follows: "The condition, which, on the basis of the physician's good-faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of her pregnancy to avert her death

or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." The reference to "good-faith clinical judgment" in this definition, the plaintiffs allege, imposes a subjective standard regarding the physician's determination that a medical emergency exists.

The court agrees with the plaintiffs' contention. The statute does indeed set forth a mixed subjective-objective in § 26-22-3(b)(1) when it states that the physician must "reasonably believe[ ]" that the abortion is necessary, for the reasons provided above regarding the statute's viability-determination provisions. Thus, like those provisions, the medical emergency exception provisions make it clear that the physician must entertain a subjective belief that the abortion is necessitated by a medical emergency, and this belief is to be assessed under an objective standard of reasonableness.

In contrast to the viability-determination standard addressed above, however, the medical emergency exception provisions are not subject to any scienter requirement. While the statute does require that the physician "intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable," this sole scienter requirement cannot reasonably be construed to extend to the physician's decision that the abortion is necessary to avoid death or substantial and irreversible impairment of the woman's health. Thus, no culpability attaches to the physician's determination of medical necessity. Consequently, the court will be required to decide whether the presence of an objective component in the standard for gauging physicians' medical judgments renders these provisions unconstitutionally vague in the absence of a curing mens rea requirement.

In making this determination, the court must once again consider the concerns voiced by the Supreme Court in Colautti about objective tests of physicians' professional conduct. In view of the plaintiffs' allegations that the determination of whether a medical emergency necessitates a post-viability abortion, like the determination of fetal viability specifically at issue in Colautti, is fraught with uncertainty and requires physicians to consider numerous

variables, as well as the plaintiffs' allegations that differing opinions among medical personnel put physicians at risk of criminal prosecution for an incorrect, though good-faith, medical judgment, the court concludes that the "perils of strict liability" described in Colautti arise with equal intensity here.

As the Court remarked in Colautti, where, as here, the specter of medical expert disagreement conjoins with a statute imposing strict criminal and civil liability for an erroneous medical determination, the result could very well be "a profound chilling effect on the willingness of physicians to perform abortions ... in the manner indicated by their best medical judgment." 439 U.S. at 396, 99 S.Ct. at 686. Simply stated, the Alabama post-viability abortion statute, as alleged by the plaintiffs, could permit a physician's good-faith medical judgment to later be second-guessed by experts, and thus could subject him or her to criminal and civil sanctions. As a result, the plaintiffs' allegations that physicians cannot be sure of the standard under which their actions will eventually be adjudged, and that they consequently would be inhibited in the exercise of constitutionally-protected rights, are well founded. Accordingly, the court concludes that the plaintiffs' vagueness challenge against the medical-emergency-determination provisions of the post-viability abortion statute is a claim upon which relief may be granted.

This conclusion is consistent with the recent decision in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 203-06 (6th Cir.1997), in which the Sixth Circuit affirmed the district court's ruling that a medical emergency exception in an enactment banning post-viability abortions was unconstitutionally vague because it employed both subjective and objective standards, and also lacked any scienter requirement. The Voinovich court noted that the medical emergency definition and medical necessity exception in the Ohio statute at issue, both of which required that the physician make determinations "in good faith and in the exercise of reasonable medical judgment," incorporated both subjective and objective standards for evaluating physicians' conduct, and therefore could subject physicians to criminal sanctions even when they exercise their good-faith

medical judgment. Id. In arriving at its decision to invalidate the post-viability abortion ban and regulations at issue in Voinovigh, the Sixth Circuit made the following observations, which are equally apt here:

"The determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others. Moreover, the lack of a scienter requirement is compounded by the fact that this Act requires that a physician meet both an objective and a subjective standard in order to avoid liability. While we need not decide whether employment of an objective standard with a scienter requirement would be constitutional, an objective standard without one is especially troublesome in the abortion context. In an area as controversial as abortion, the need for a scienter requirement is, as the Supreme Court pointed out, particularly important. In this area where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably. Under the Act, a physician who performs a post-viability abortion under either the medical emergency or medical necessity exception may be held liable, even if the physician believed he or she was acting reasonably, and in accordance with his or her best medical judgment, as long as others later decide that the physician's actions were nonetheless unreasonable."

130 F.3d at 205 (emphasis added).

(c) Vagueness as to Determination of Whether Medical Emergency Prevents Compliance with Procedural Requirements

The plaintiffs' next vagueness challenge concerns the provision of the post-viability act that excuses physicians from complying with the five procedural requirements for performance of a post-viability abortion where the nature of the medical emergency prevents such compliance. The pertinent provision reads as follows: "Except in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents

compliance with a particular requirement of this subsection, no abortion which is authorized under subsection (b)(1) shall be performed unless each of the following conditions are met:...." 1975 Ala.Code § 26-22- 3(c) (Law.Co-op.Supp.1997) (emphasis added). Plainly, this provision, by use of the term "reasonable" to describe the medical judgment that must be employed, imposes a standard with an objective component on the physician's determination of whether compliance with one of the statute's procedural requirements is impossible due to the nature of the medical emergency. Additionally, examination of the statute reveals that liability for an erroneous determination under this provision is not subject to any scienter requirement. Thus, as the plaintiffs allege, the post-viability abortion statute imposes strict liability on a physician who forms an unreasonable medical judgment that a woman's medical condition prevents compliance with one or more of the five procedural requirements set forth in § 26-22-3(c)(1) through (5) of the act, and consequently fails to comply with those requirements.

Accordingly, the court must again decide whether the plaintiffs have stated a claim upon which relief may be granted that the objective component of the standard governing physicians' medical determinations, in the absence of a scienter requirement, renders the pertinent provisions unconstitutionally vague. In view of Colautti, and for all of the reasons stated above regarding the alleged vagueness of the provisions governing whether the post-viability abortion is medically necessary, the court finds that the plaintiffs have stated a claim concerning the provisions at issue here. Based upon the plaintiffs' allegations regarding the uncertainty inherent in physicians' judgments regarding the nature and implications of medical emergencies, the court concludes that the "perils of strict liability" discussed in Colautti are present here, where physicians exercising their good faith medical judgment regarding whether compliance with statutory requirements is prevented by a medical emergency could nonetheless be held liable if other physicians subsequently second-guess their determinations.

B. Alleged Undue Burden Imposed By the Partial-Birth Abortion Statute

Having addressed all of the vagueness challenges to the post-viability abortion statute, the court must next ascertain whether the plaintiffs have stated a claim regarding the alleged undue burden imposed on pregnant women by the partial birth abortion statute. The undue-burden challenges are grounded primarily on the Supreme Court's decision in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 872-76, 112 S.Ct. 2791, 2817-20, 120 L.Ed.2d 674 (1992), in which a plurality of the Court abandoned the trimester- based analytic framework for determining the constitutionality of abortion regulations developed in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in favor of one that requires courts to ascertain whether pre-viability abortion regulations impose an undue burden on the woman's right to make the ultimate decision whether to terminate her pregnancy. In somewhat more concrete terms, Casey forbids states from enacting pre-viability abortion regulations that have "the purpose and effect of placing a substantial obstacle in the path of a woman seeking an abortion." See id., 505 U.S. at 877, 112 S.Ct. at 2820.

As alluded to above in the context of the plaintiffs' vagueness challenges, the court must resolve an important threshold issue prior to undertaking the undue-burden analysis. Specifically, the court must determine whether the standard governing this analysis is that articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), under which the court may invalidate the statute only after concluding that it imposes an undue burden under all possible circumstances, or the standard that was actually employed in Casey itself, where the Supreme Court looked at whether "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a women's choice to undergo an abortion." Casey, 505 U.S. at 895, 112 S.Ct. at 2830 (emphasis added). Although at first blush it seems obvious that the court should apply the less- restrictive Casey formula, the answer is not so straightforward because the Casey plurality did not explicitly acknowledge that it had abandoned the Salerno test in the pre-viability abortion context in favor of the less stringent standard it applied, and individual justices in post-Casey opinions have adopted inconsistent positions concerning this

question, as have several lower courts. See Voinovich, 130 F.3d at 194-95 (citing conflicting post-Casey statements made by various Supreme Court justices regarding Salerno's continued vitality, and holding that the Casey standard applies to pre-viability abortion regulations after surveying the pertinent post- Casey lower court decisions and noting that the Third, Eighth, and Tenth Circuits, as well as two district courts, apply that standard, while only the Fifth Circuit applies the more stringent Salerno test). The Eleventh Circuit has not yet grappled with this issue, which appears to be one of first impression in this circuit.

This court agrees with the majority of courts that have addressed this question and concludes that challenges to the pre-viability application of the Alabama abortion statutes are governed by the Casey standard, rather than that set forth in Salerno.[36] In doing so, this court, like the Sixth and Eighth Circuits, has decided to "follow what the Supreme Court actually did--rather than what it failed to say--and apply the undue-burden test." See Voinovich, 130 F.3d at 195-96; Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir.1995). Therefore, in determining whether the plaintiffs have stated a claim that the partial-birth abortion statute imposes an undue burden on women seeking pre-viability abortions, the court will ascertain whether the plaintiffs have alleged that "in a large fraction of cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Casey, 505 U.S. at 895, 112 S.Ct. at 2830. Accordingly, as the Sixth Circuit stated in Voinovich, "Even if the Act has some constitutional applications, [the court] must strike it down if it is unconstitutional under Casey." 130 F.3d at 196.

The plaintiffs level two primary undue burden challenges against the act: (1) that to the extent the statute prohibits a woman from obtaining a pre- viability abortion

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[36]This conclusion applies only to the plaintiffs' pre-viability challenges; whether the Salerno or Casey standard governs the plaintiffs' post-viability challenges to the Alabama abortion statutes is a separate question that is taken up below.

altogether, because it forecloses her use of the most common and safest means available, it imposes an undue burden; and (2) that to the extent the statute forces a woman who chooses to terminate her pregnancy to use an alternative method to the one she prefers, with an attendant increase in risk to her health, it imposes an undue burden.

As other courts that have examined analogous partial-birth abortion statutes have observed, the Supreme Court has offered only limited guidance as to how the Casey standard is to be applied in the context of a ban on a specific abortion technique. See Voinovich, 130 F.3d at 200-01; Evans v. Kelley, 977 F.Supp. 1283, 1315-16 (E.D.Mich.1997). While no post-Casey Supreme Court decisions have addressed such a ban, the Court in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), did examine a statute that banned a specific abortion procedure, and thus this decision offers some guidance as to how this court should approach the plaintiffs' challenges to Alabama's partial-birth abortion statute.

In Danforth, the Court invalidated a Missouri statutory ban on the use of the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy. Having found that saline amniocentesis was a very safe and prevalent procedure for post-first-trimester abortions, the Court concluded that the act, "as a practical matter ... forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79, 96 S. Ct. at 2845. As a consequence, according to the Court, the act represented "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting the vast majority" of second trimester abortions, and thus could "not withstand constitutional challenge." Id.

Consistent with the approaches taken in both Danforth and Casey, this court, like the courts addressing partial-birth abortion bans in Voinovich and Evans, will determine whether the Alabama act imposes an undue burden by examining whether there are safer alternative procedures available in the state than those alleged to be banned by the act. See Voinovich, 130 F.3d at 200-01 (finding that the challenged

statute imposed an undue burden because it banned "the most common method of abortion in the second trimester"); Evans, 977 F.Supp. at 1315-19 (finding that the challenged statute imposed an undue burden by comparing the banned procedures to other available pre-viability abortion procedures). Thus, before the court may ascertain whether the plaintiffs have stated a claim that the partial-birth abortion statute imposes an undue burden and so is unconstitutional under Casey, it must first determine with precision the actual procedures that are subject to the act's proscription. In other words, the court cannot perform the requisite comparison of the relative safety of the banned techniques and any other available procedures without first understanding exactly which techniques are banned by the statute.

The court is not presently in a position to undertake this comparison because it has not yet determined which abortion procedures are banned by the partial- birth abortion statute. Instead, because the relevant provisions of the statute have not yet been construed by the Alabama courts, and the particular construction adopted by that court will undoubtedly affect the determination of the constitutional questions raised in the complaint, the court has opted to certify the question of which specific techniques are outlawed by the statute to the Alabama Supreme Court. Consequently, until that court has spoken, this court cannot determine whether the plaintiffs' undue burden challenges against the partial-birth abortion statute state a claim upon which relief may be granted. The court will therefore postpone ruling on this issue until the Alabama Supreme Court has responded to the certified questions, and the foregoing discussion is intended to provide the parties with guidance as to the analytical scheme the court will employ to adjudicate the plaintiffs' undue burden challenges to the partial-birth abortion statute.

C. Alleged Unconstitutionality of the Partial-Birth Abortion Statute Due to Lack of a Maternal Health Exception

The plaintiffs also challenge the constitutionality of the partial-birth abortion statute to the extent it regulates post viability abortions. Specifically, the plaintiffs assert that

the ban is unconstitutional because the sole emergency exception provision in the statute, § 26-23-4, relieves the physician of liability only where the partial-birth abortion is necessary to save the woman's life, and not for abortions deemed necessary to preserve maternal health more generally. In support of this argument, the plaintiffs point to the Court's statement in Casey that it "re-affirm[ed] Roe's holding that subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879, 112 S.Ct. at 2821 (emphasis added). According to the plaintiffs, the Alabama statute is unconstitutional under this standard because it could impermissibly force a women to undergo a more dangerous and life-threatening procedure even where her physician concludes that an abortion procedure proscribed by the act is necessary to preserve her health; thus, it is only when the woman is actually dying, the plaintiffs contend, that she may have recourse to the proscribed procedures.

Despite the fact that this court has decided to certify to the Alabama Supreme Court questions pertaining to the definition of the precise procedures proscribed by the partial-birth abortion statute, it sees no reason to postpone its decision on whether this challenge presents a claim upon which relief may be granted. It seems clear that, regardless of how the Alabama Supreme Court construes the statute, post-viability applications of certain abortion procedures will be banned. Thus, the question of whether the alleged absence of a maternal health exception renders the statute unconstitutional, to the extent that it proscribes post-viability abortions, will not be rendered moot, or be substantially altered, by the state court's answer to the certified questions.

i. Legal Standard for Facial Challenges to Post-Viability Abortion Regulations

Before it may consider whether this challenge to the partial-birth abortion statute, based upon its alleged lack of any maternal health exception, constitutes a claim upon which

relief may be granted, the court must first revisit the question of whether the applicable standard for such a facial challenge to a statute is that articulated in United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), which requires that the plaintiffs show that "no set of circumstances exist under which the [statute] would be valid," or the standard employed in Casey, under which the plaintiffs must demonstrate that the statute would be unconstitutional "in a large fraction of the cases in which [it] is relevant." [37]

This determination is distinct from that undertaken previously by the court in relation to the plaintiffs' challenges to the pre viability regulation of abortions, because the

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[37]The determination of which standard governs the plaintiffs' challenge to the post-viability application of the partial-birth abortion statute is critical. Should the court find that Salerno applies, the plaintiffs would face an insurmountable barrier. Specifically, they could never establish that "no set of circumstances" exists under which the statute would be valid, because they could not demonstrate that all women seeking post-viability abortions would suffer a medical emergency that required them to undergo a partial-birth abortion to preserve their health. That is, the plaintiffs could not counter an argument that in the vast majority of cases in which women seek post-viability abortions, the statute would impose no burden whatsoever because all but a few such women would not face a medical emergency necessitating recourse to a partial- birth abortion procedure to preserve their health.

By contrast, the plaintiffs could possibly satisfy the more permissive Casey standard, by alleging facts sufficient to establish that "in a large fraction of the cases" in which women seek post-viability abortions, the absence of a maternal health exception in the partial-birth abortion statute would unconstitutionally deprive women of access to a technique that would better preserve their health than non-proscribed alternative procedures. See Casey, 505 U.S. at 894-95, 112 S.Ct. at 2829-30 (rejecting state's argument that the challenged abortion regulation imposed almost no burden at all on the vast majority of women seeking abortions, and stating that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant").

Supreme Court had occasion to apply the less restrictive test in Casey only as to pre-viability enactments, and not those proscribing or regulating post-viability abortions.

The attorney general defendants contend that this question is not controversial, because in the area of post-viability regulations, "there is no post-Casey confusion as to the applicability of the Salerno ... standard."[38] The attorney general defendants therefore argue that under the governing Salerno standard the plaintiffs' claims contesting the constitutionality of the post-viability applicability of the partial-birth abortion statute should be dismissed because the plaintiffs have failed to allege that "no set of circumstances exist under which the Act would be valid" in the post-viability context. However, the attorney general defendants cite no post-Casey decisions to support their rather conclusory assertion that no confusion surrounds the post-viability applicability of the Salerno standard, and the court's investigation indicates that any absence of confusion stems solely from the fact that the instant dispute is only the second one in which courts have been confronted with this precise question. See Voinovich, 130 F.3d at 196. Moreover, as explained below, in Voinovich, the one other instance in which this question has been addressed, the Sixth Circuit concluded that the Casey "large fraction of cases" standard, and not that articulated in Salerno, governs facial challenges to post-viability regulations. See id.

In Voinovich, the Sixth Circuit recognized that Casey itself does not answer the question of which standard to apply in the post-viability context. Id. Nonetheless, the court affirmed the district court's holding that Casey's standard should be extended to post-viability abortion regulations,

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[38]Supplemental memorandum in support of defendants' motion to dismiss, filed on September 22, 1997 (Doc. no. 22), at 37 n. 21.

because it could "see no reason to apply a different standard for pre and post-viability abortions." Id. The district court had provided the following explanation for its conclusion:

"After careful consideration of the interests involved, this Court concludes that the Salerno requirement that the plaintiff must show that 'no set of circumstances exists under which the law would be valid,' should not apply to facial challenges to post-viability abortion regulations which may unconstitutionally threaten the life or health of even a few pregnant women. The Court so holds for three reasons. First, the cases which have applied Salerno have not involved laws which threaten to inflict, unconstitutionally, such severe and irreparable harm. Second, because the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life and health. Finally, and most importantly, it would be unconscionable to hold that a pregnant woman--or her estate--may not challenge a post-viability regulation until after she is unconstitutionally deprived of her life or health. Therefore, this Court will allow Plaintiff to facially challenge this post-viability ban, even though he has not shown that 'no set of circumstances' exists under which the ban would be valid."

Women's Medical Professional Corp. v. Voinovich, 911 F.Supp. 1051, 1062 (S.D.Ohio 1995) (internal footnote omitted).

Although this court largely agrees with this analysis, and reaches the same conclusion, further explanation is warranted. In determining whether the Casey standard should apply to post-viability regulations, the court must be sure to take into account the fact that the state has a "profound interest" in potential life, which may be promoted subsequent to viability by regulation, or even proscription, of abortion, except where necessary to preserve maternal life or health. See Casey, 505 U.S. at 878-79, 112 S.Ct. at 2821. As the Casey plurality stated, after viability has been reached, this interest

in potential life has "sufficient force so that the right of the woman to terminate the pregnancy can be restricted." Id. at 869, 112 S.Ct. at 2816. In other words, post-viability, "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." Id. at 870, 112 S.Ct. at 2817. By contrast, in the pre-viability context, where the majority of courts have rejected the Salerno approach in favor of that of Casey, the woman's rights are not outweighed by those of the state. As a result, the state is limited to adopting "measures to ensure that a woman's choice is informed ... as long as their purpose is to persuade the woman to choose childbirth over abortion [and they are not] an undue burden on the right [of the woman to obtain a pre-viability abortion]." Id.

Accordingly, the question of whether Casey's less-restrictive standard applies to post-viability abortion regulations must accord sufficient deference to the enhanced strength of the state's interest in protecting potential life at that stage of the pregnancy. Although neither the Sixth Circuit nor the district court in Voinovich explicitly discussed whether this interest of the state militates against extending the Casey pre- viability standard to the post-viability context, and thus one cannot determine whether these courts considered this crucial issue, this court concludes that the Voinovich district court's second and third rationales do provide a sufficient basis for adopting the Casey standard even in the face of the enhanced state interest in potential life.

The district court in Voinovich explained its second rationale for extending the Casey standard to post-viability regulations as follows: "[B]ecause the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life an health." Voinovich, 911 F.Supp. at 1062. Thus, the district court concluded that because pregnant women's constitutional interest in their own life and health is even stronger than the women's liberty

interest in choosing to terminate a pregnancy, the Supreme Court would perceive no difficulties in applying the permissive Casey standard to an arena where the former interest is implicated by a state's restrictions on post-viability abortions.

This court agrees that a woman's profound constitutional interest in her own life and health justifies extension of the Casey standard to the post- viability abortion arena, because this interest is sufficiently powerful to overcome the state's interest in potential life even after the viability threshold has been crossed. See Casey, 505 U.S. at 879, 112 S.Ct. at 2821 (recognizing women's interest in their own life and health by re-affirming that post-viability abortions may not be proscribed or regulated where they are necessary to preserve the life or health of the mother). Thus, this court, like the district court in Voinovich, sees no reason why the Supreme Court would not apply the Casey standard to facial challenges to post-viability abortion regulations.

This conclusion is bolstered by the third rationale provided by the Voinovich district court for its adoption of the Casey standard, that "it would be unconscionable to hold that a pregnant woman--or her estate--may not challenge a post-viability regulation until after she is unconstitutionally deprived of her life or health." 911 F.Supp. at 1063 (emphasis in original). This well-founded concern stems from the district court's recognition that the all-but-insurmountable Salerno standard would effectively close the courthouse doors to facial challenges to abortion statutes even where a plaintiff alleges that her life or health interests are jeopardized unconstitutionally, leaving no alternative aside from an "as applied" challenge brought after the plaintiff has suffered a constitutional injury under the challenged act. Of course, as the Voinovich district court appreciated, such lawsuits would come too late for women who have died or whose health has been irreparably damaged because a necessary abortion procedure was rendered off-limits by an unconstitutional state enactment.

Thus, for the foregoing reasons, the court will apply the Casey standard to adjudicate the plaintiffs' facial

challenges to the post-viability application of the partial-birth abortion statute.[39] And thus, for purposes of the pending motion to dismiss, the court will permit the plaintiffs to mount a facial attack on the disputed post-viability regulations even if they cannot demonstrate that " 'no set of circumstances' exists under which the pertinent provisions would be constitutional. Instead, the plaintiffs must merely allege sufficient facts to indicate that these provisions would be unconstitutional in a large fraction of the cases in which [they are] relevant." See Casey, 505 U.S. at 895, 112 S.Ct. at 2830 (plurality opinion)

ii. Application of the Legal Standard to Plaintiffs' Challenges to the Post- Viability Application of the Partial-Birth Abortion Statute

As stated, the plaintiffs' challenge to the partial-birth abortion statute based upon its lack of any maternal health exception relies heavily upon the Casey Court's express reaffirmance of Roe's holding that, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879, 112 S.Ct. at 2821 (emphasis added). The plaintiffs further rely upon the Supreme Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69, 106 S.Ct. 2169, 2183, 90 L.Ed.2d 779(1986), and a Tenth Circuit decision, Jane L. v. Bangerter, 61 F.3d 1493, 1504 (10th Cir.1995), rev'd on other grounds sub nom. Leavitt v. Jane L., 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996), on remand, 102 F.3d 1112 (10th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997), in support of this argument.

In Thornburgh, a pre-Casey decision, the Supreme Court invalidated a Pennsylvania statute that compelled

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[39]For the reasons stated above, this standard will also be applied to the plaintiffs' challenges to the provisions of Alabama's post-viability abortion statute.

physicians performing post-viability abortions to employ the technique that "would provide the best opportunity for the unborn child to be aborted alive, unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment." 476 U.S. at 768 n. 13, 106 S.Ct. at 2183 n. 13 (emphasis added). The Court expressly agreed with the Third Circuit's holding that this provision was unconstitutional "because it required a 'trade-off' between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration." Id. at 768-69, 106 S.Ct. at 2183 (citing Colautti, 439 U.S. at 397-401, 99 S.Ct. at 686-689).

Similarly, the Tenth Circuit in Jane L. struck down as unconstitutional two sections of a Utah abortion statute that required physicians to perform post- viability abortions in a manner that would "give the unborn child the best chance of survival," unless such a method would cause "grave damage to the woman's medical health." 61 F.3d at 1502-05. The Jane L. court rejected the defendants' contention that the portions of Thornburgh discussed above were "uprooted by Casey," and instead concluded that Thornburgh governed the determination of whether the provisions at issue were constitutionally infirm.[40] Noting that the Utah statute dictated that fetal survival must take precedence over maternal health absent a risk of "grave damage," the Jane L. court held that the statute violated the "consistent strain of abortion jurisprudence," running through the Supreme Court's decisions in Roe, Thornburgh, and Casey, requiring that "maternal health, not fetal survival, remains the physician's paramount consideration." Jane L., 61 F.3d at 1504. As the

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[40]The Tenth Circuit stated, and this court agrees, that although Casey overruled the portions of Thornburgh that addressed the issue of informed consent, the Supreme Court left intact Thornburgh to the extent that it relied upon Roe's approach to post-viability regulation of abortions, which was expressly reaffirmed in Casey. See Jane L., 61 F.3d at 1504 & n. 9.

Tenth Circuit further explained:

"'Grave damage' is clearly a higher standard than the Court has articulated. According to Casey, Thornburgh, and Roe, concern for the 'preservation' of a woman's health suffices to elevate her liberty interests decisively above those of the state or the unborn child. By requiring a woman to suffer 'grave damage' to her health before her liberty interests predominate, the Utah legislature violated those portions of Roe and Thornburgh that Casey reaffirmed, and unconstitutionally devalued a woman's privacy rights."

Id.

Although this court recognizes that both Thornburgh and Jane L. addressed statutes that purported to ban post-viability abortions generally, except under particular circumstances, including when certain medical emergencies exist, while Alabama's partial-birth abortion statute bans the post-viability application of only a specified type of abortion procedure, the court concludes that the reasoning underlying Thornburgh and Jane L. applies with equal force here. All three abortion statutes (those in Thornburgh, Jane L., and the partial-birth abortion statute at issue here) have the effect of limiting the woman's, and her doctor's, choice of an appropriate abortion method, creating the possibility that a preferred method may be proscribed except where there exists a medical emergency satisfying certain specific requirements. In fact, because the plaintiffs allege that the Alabama statute is devoid of any exception whatsoever to protect maternal health, while the two state enactments addressed in Thornburgh and Jane L. did at least contain some form of health exception, rather than just an exception to protect the pregnant woman's life, the constitutional infirmity may be even more pronounced here than it was in Thornburgh and Jane L. Thus, in view of these decisions and the plaintiffs' allegations that the Alabama partial-birth abortion statute lacks any maternal health exception whatsoever, the court concludes that this challenge to the partial birth abortion statute presents a claim upon which relief may be granted.

D. Alleged Unconstitutionality of the Partial-Birth Abortion Statute's Civil Liability Provisions

In their final attack on the constitutionality of the partial-birth abortion statute, the plaintiffs challenge the civil-liability provisions of the act, which provide for tort claims against the physician performing the proscribed abortion. Either the "father" of the fetus, if married to the woman who underwent the abortion, or the "maternal grandparents" of the fetus, if the woman was a minor at the time, may bring such an action. No suit may be brought by the complainant if the complainant consented to the abortion, or if the complainant's criminal conduct caused the pregnancy.

The plaintiffs support their argument by reference to a number of Supreme Court decisions that have addressed the constitutionality of statutes providing for a spousal or parental "veto" of a woman's decision to terminate her pregnancy, as well as decisions that have examined similar "notification" provisions. The plaintiffs assert that the liability provisions in the Alabama act are tantamount to the types of spousal or parental consent and notification requirements that the Supreme Court has invalidated as creating an unconstitutional impediment to a woman's right to terminate her pregnancy, because although they do not expressly require that the woman or her physician obtain the consent of the husband or parents, only by seeking such consent may the physician evade liability under the statute. The plaintiffs further support this argument by bringing to the court's attention a recent decision, Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F.Supp. 1369, 1379-1380 (D.Ariz.1997), in which the district court held unconstitutional an Arizona partial-birth abortion statute containing a civil liability provision analogous to that in the Alabama enactment because, among other reasons, it found that there is no practical difference between such a provision and one that mandates spousal or parental consent. [41]

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[41]The pertinent provision of the Arizona act reads as follows:

"The father of the fetus if married to the mother at the time

The attorney general defendants urge the court to dismiss this claim on two grounds. First, they assert that the plaintiffs cannot bring the claim under the fourteenth amendment because, in the context of civil lawsuits for damages, the requisite "state action" does not exist until an enforceable judgment against the plaintiffs has been entered. Second, the attorney general defendants contend that the civil-liability provisions further rational state interests and do not sufficiently interfere with women's right to a pre-viability abortion to constitute an undue burden under Casey. To support this latter point, the attorney general defendants direct the court's attention to Midtown Hosp. v. Miller, No. 1:97-CV-1786-JOF, slip. op. at 13-16 (N.D.Ga. July 24, 1997), in which the district court upheld a Georgia partial- birth abortion statute containing a civil-liability provision whose language tracks that of the Alabama and Arizona statutes.

The court rejects both of these arguments, and concludes that the plaintiffs' challenge to the civil liability provision of the partial-birth abortion statute presents a claim upon which relief may be granted. Regarding the attorney general defendants' contention that the plaintiffs cannot attack the constitutionality of the civil liability provisions under the fourteenth amendment absent an enforceable judgment entered by a state court, the court agrees, of course, that there must be "state action" in order for the plaintiffs to raise a claim of violation of the fourteenth amendment's due process

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she receives a partial-birth abortion and the maternal grandparents of the fetus if the mother is not at least eighteen years of age at the time of the partial- birth abortion may bring a civil action to obtain appropriate relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the partial-birth abortion. Relief pursuant to this subsection includes the following:

1. Monetary damages for all injuries resulting from the partial-birth abortion, including psychological and physical damages.

2. Damages in an amount equal to three times the cost of the partial-birth abortion."

Ariz.Rev.Stat. Ann. § 13-3603.01(C).

clause. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). However, the court rejects the attorney general defendants' assertion that state action does not exist here absent a civil judgment against the plaintiffs entered by a state court. Instead, the court concludes that the requisite state action has been alleged by the plaintiffs, when they assert that the civil liability provisions are, in practical terms, akin to statutory requirements that women seek the consent of their parents or spouses before obtaining abortions. In other words, the plaintiffs allege that these provisions, far from functioning merely as neutral statutes that facilitate civil suits between private parties, represent a conscious effort by the state to make it more difficult for women to obtain desired abortions by requiring the women, or their physicians, to first secure their parents or spouses' consent. These allegations of purposeful, albeit somewhat circuitous, state regulation of women's conduct are sufficient to support a conclusion that the requisite state action exists with regard to the challenged civil liability provisions.

This conclusion is reinforced by the additional fact that the plaintiffs here allege that the enactment of the allegedly unconstitutional partial-birth abortion statute caused them injury by threatening them with potential criminal and civil liability if they continue their professional--and allegedly constitutionally-protected--activities. Thus, here the plaintiffs contend that state action sufficient to permit their claims occurred during the enactment of the challenged statute by the state legislature and the governor, and the plaintiffs need not depend upon any actual or potential private enforcement of the statutes by litigants bringing civil actions. See Denver Area Educational Telecommunications Consortium Inc. v. F.C.C., 518 U.S. 727, ----, 116 S.Ct. 2374, 2404, 135 L.Ed.2d 888 (1996) (Kennedy, J., concurring in part and dissenting in part) (agreeing with plurality opinion's holding that the enactment of the challenged statute constituted state action, and noting that "state action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State"); Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 880 (9th

Cir.1987) ("State laws whether statutory or common law ... constitute state action."). Consistent with this fact, the plaintiffs have named as a defendant in this action Alabama's governor, one of the state actors responsible for the enactment of the statute. Accordingly, the court finds that the plaintiffs may pursue their challenge to the civil liability provisions of the two abortion statutes pursuant to the fourteenth amendment.[42]

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[42]The court acknowledges that other courts have held, under certain circumstances, that the mere enactment of a statute, without further involvement of state actors in the allegedly unconstitutional conduct, may not provide the requisite state action for purposes of an action under the fourteenth amendment. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (noting that the enactment of "self-executing" statutes of limitations addressed in previous decisions was obviously state action, but that "the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause."); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (holding that the sale by a storage company of an individual's property to enforce a lien on that property, pursuant to a provision of the New York Uniform Commercial Code, did not constitute "state action" for fourteenth amendment purposes.) In Flagg Bros., the Court expressly rejected the plaintiffs' claim that the proposed sale of their property by the defendant storage company was attributable to the state because it had "authorized and encouraged" such action by enacting the applicable provision. Id. at 164-66, 98 S.Ct. at 1737-38.

Significantly, however, Flagg Bros. concerned an attempt to sue a non- state-actor defendant on the basis of its exploitation of the challenged statutes, and did not involve a claim, such as that raised here, brought against a state actor responsible for the enactment of the challenged statute based upon allegations that the very enactment of the statute threatened to chill the plaintiffs' exercise of constitutionally-protected rights. In fact, the Court in Flagg Bros. did not specifically address the state action implications of enactment of the statute, but rather determined that private parties acting pursuant to the statute were not state actors because

The court also rejects the attorney general defendants' second contention, that the civil liability provisions do not impose an undue burden because they further rational state interests and operate only in a limited set of circumstances. As stated, the plaintiffs allege that the civil liability provisions are tantamount to statutory requirements that women seek the consent of their parents or spouses before obtaining abortions. These allegations are sufficient to support a claim upon which relief may be granted. See Planned Parenthood of Southern Ariz. v. Woods, 982 F.Supp. 1369, 1379-1380 (D.Ariz.1997) (holding that analogous civil liability provisions are unconstitutional because they are akin to spousal and parental consent provisions). The Supreme Court has found that abortion statutes requiring notification of husbands can "prevent a significant number of women from obtaining an abortion," and thus impose an undue burden on their right to abortion. See Casey, 505 U.S. at 893-94, 112 S.Ct. at 2829 (further noting that, in view of the myriad legitimate fears women have about informing their husbands that they intend to seek an abortion, a spousal notification provision "does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle"). Additionally, the Supreme Court has consistently required that statutes mandating parental consent must provide for a judicial bypass procedure. Id. at 899, 112 S.Ct. at 2832; Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-19, 110 S.Ct. 2972, 2978-83, 111 L.Ed.2d 405 (1990); Bellotti v. Baird, 443 U.S. 622, 643-44, 99 S.Ct. 3035, 3048, 61 L.Ed.2d 797 (1979) (plurality opinion). The partial-birth abortion statute provides for no such bypass procedure. Thus, the court declines to conclude, as the attorney general defendants urge, that the civil liability provision does not, as a matter of law, impose an undue burden on women seeking abortions. Accordingly, the court will not dismiss this

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the statute had not delegated to the private parties functions exclusively reserved to the state. 436 U.S. at 157-64, 98 S.Ct. at 1733-37. Furthermore, in Flagg Bros. the plaintiffs made no contention, as is made here, that the challenged statute was tantamount to a direct effort by the state to regulate allegedly constitutionally- protected conduct. Thus, the holding in Flagg Bros. is inapposite here.

challenge to the partial-birth abortion statute as failing to state a claim upon which relief may be granted.

E. Alleged Unconstitutionality of the Post-Viability Abortion Statute Due to "Trade-Off" between Woman's Health and Fetal Survival

In their final challenges, leveled against the post-viability abortion statute, the plaintiffs assert that the procedural requirements imposed by the statute on physicians performing post-viability abortions constitute an impermissible "trade-off" between the health of the pregnant woman and the fetus' survival. Specifically, the plaintiffs target the following requirements in the statute: (1) the requirement in § 26-22-3(c)(2) that the physician obtain the concurrence of a second physician regarding the necessity for the post-viability abortion; (2) the requirement in § 26-22-3(c)(3) that the abortion be performed in a hospital; (3) the requirement in § 26-22-3(c)(4) that the physician use the abortion technique that "provides the best opportunity for the unborn child to survive," except where this method would pose "a significantly greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function of the woman than would other available methods"; and (4) the requirement in § 26-22-3(c)(5) that the physician arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician who is charged with caring for the aborted child.

Before considering whether these challenges present claims upon which relief may be granted, the court first notes that each of the disputed requirements is subject to the medical emergency exception discussed in detail above, which provides that the physician need not satisfy the requirement "in the case of a medical emergency which, in the reasonable medical judgment of the physician performing the abortion, prevents compliance...." 1975 Ala.Code § 26-22-3(c) (Law.Co-op.Supp.1997). As previously explained, the court has concluded that the plaintiffs have stated a claim that this emergency exception is unconstitutional because they allege that it imposes an objective standard of conduct without a curing scienter requirement. If the plaintiffs prevail on this

claim, all of the challenged procedural requirements would fall as well, because they would no longer be subject to an exception, as required under the pertinent Supreme Court case law, for the preservation of the life or health of the mother. See Casey, 505 U.S. at 879, 112 S.Ct. at 2821 (reaffirming Roe's holding that the state may regulate post-viability abortions "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."); cf. Voinovich, 130 F.3d at 206 (noting that because it had invalidated the medical emergency and necessity provisions of a post-viability abortion act, the court did not need to reach the constitutionality of the remaining post-viability regulations). Therefore, because the court will reach the merits of the plaintiffs' challenges to the procedural requirements of the post-viability abortion statute only if it upholds the constitutionality of the medical emergency exception, the court will assume for the sake of determining whether these challenges present a claim upon which relief may be granted that the exception is constitutional, and thus operates to relieve the physician of responsibility for complying with any of the requirements where a medical emergency prevents such compliance.

The attorney general defendants' contention is wellfounded that all of the challenged requirements were included in the act to further the state's interest in the potential life of the fetus. This interest, as stated, is a "profound" one that may override the liberty rights of women seeking post-viability abortions. See Casey, 505 U.S. at 870, 112 S.Ct. at 2817; see also Planned Parenthood v. Ashcroft, 462 U.S. 476, 482-86, 103 S.Ct. 2517, 2520-22, 76 L.Ed.2d 733 (1983) (reaffirming Roe's holding that the state's interest in potential life is compelling, and upholding certain regulations of physician conduct during post-viability abortions because they "reasonably further" that compelling interest of the state). Thus, in determining whether the plaintiffs' challenges to the post-viability abortion statute should be dismissed, the court must ascertain whether the plaintiffs have alleged that the disputed statutory requirements do not "reasonably further" the state's compelling interest in potential life.

While the plaintiffs do not contest the applicability

of this standard to their "trade-off" challenges, they rely upon the Supreme Court's holding in Thornburgh to urge the court to reject the attorney general defendants' contention that these claims should be dismissed. Specifically, the plaintiffs point to the holding in Thornburgh that abortion statutes must not create "an impermissible 'trade-off' between the woman's health and fetal survival," and thus fail to "require that maternal health be the physician's paramount consideration." 476 U.S. at 768-69, 106 S.Ct. at 2183. Each of the challenged requirements in the post-viability abortion statute, the plaintiffs contend, violates this constitutional standard, and must therefore be invalidated.

The plaintiffs make their point most persuasively with respect to § 26-22- 3(c)(4) of the statute, which, as noted above, requires that the physician use the abortion technique that "provides the best opportunity for the unborn child to survive," except where this method would pose "a significantly greater risk of the death of the pregnant woman or substantial and irreversible impairment of a major bodily function of the woman than would other available methods." Such a provision is known as a "choice-of-method" provision, because it restricts the woman's, and her doctor's, ability to choose the exact post- viability abortion method to be employed. See Jane L., 61 F.3d at 1502-03. The plaintiffs maintain that the choice-of-method provision in the Alabama act is unconstitutional because it permits safer alternative techniques to be used only when the method that maximizes the fetus's chances for survival poses a "significantly greater risk" than the safer techniques, and not when, as is medically prudent, the statutorily-mandated technique is merely more risky than the alternative techniques. This restriction on the choice of abortion method, according to the plaintiffs, contravenes the pertinent Supreme Court standard because it favors fetal survival over maternal health and fails to ensure that the latter will remain the physician's paramount concern during the abortion procedure.

The court concludes that these allegations are sufficient to present a claim upon which relief may be granted. As discussed above, the notion of an impermissible "trade-off" between maternal health and fetal survival, as applied to

choice-of-method provisions, first emerged in Thornburgh. The provision invalidated in that case required that physicians performing post- viability abortions employ the technique "which would provide the best opportunity for the unborn child to be aborted alive unless ... that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique...." 476 U.S. at 768 n. 13, 106 S.Ct. at 2182 n. 13 (emphasis added). Thus, this choice-of-method provision, like that found in the Alabama post-viability abortion statute, employed a significantly greater risk standard. Consequently, the Thornburgh Court's holding that the statutory language "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus" enjoys equal weight here, as does the Court's conclusion that the provision therefore is unconstitutional. In view of this fact, the court concludes that the plaintiffs have stated a claim upon which relief may be granted.

This conclusion withstands the court's assumption, stated above, that the emergency exception to the choice-of-method requirement is found constitutional and thus circumscribes the operation of this provision. Pursuant to that emergency exception, the physician would only be relieved of the responsibility for using the less safe, but statutorily-mandated, procedure where the medical emergency is such that that procedure would "create a serious risk of substantial and irreversible impairment of a major bodily function." See 1975 Ala.Code. § 26-22-2(6) (Law.Co-op.Supp.1997) (definition of "medical emergency"). Because this "serious risk" standard is also susceptible to attack, in view of Thornburgh, as too restrictive and thus as imposing an impermissible trade-off between maternal health and fetal survival, the court stands by its conclusion that the plaintiffs have indeed stated a claim that the choice-of-method provision contravenes Supreme Court precedent concerning post-viability abortion regulations.

As far as the plaintiffs' allegations regarding the remaining procedural requirements of the post-viability abortion statute are concerned, the attorney general

defendants argue that the Supreme Court's decision in Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), compels a conclusion that the challenged provisions are constitutional because they reasonably further the state's compelling interest in potential life. In Ashcroft, the Court upheld a Missouri statutory provision that required the presence of a second physician at the abortion of a viable fetus and that the second physician "take all reasonable steps in keeping with good medical practice ... to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman." 462 U.S. at 483, 103 S.Ct. at 2521. The Court disagreed with the lower courts' rulings that this provision was unconstitutional, and instead held that it reasonably furthered the state's compelling interest in protecting the lives of viable fetuses. In doing so, the Court rejected the argument that a second-physician requirement "distorts the traditional doctor-patient relationship, and is both impractical and costly." Id. at 483-484, 103 S.Ct. at 2521-22.

The attorney general defendants' reliance on Ashcroft is most clearly pertinent to the plaintiffs' challenge to § 26-22-3(c)(5) of Alabama's post-viability abortion statute, which mandates that a second physician be present at the abortion and care for the aborted child.[43] Importantly, however, the

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[43]Although the plaintiffs do not describe the precise nature of this challenge to the second-physician-attendance requirement, it appears that they may be pursuing one or both of two separate theories: (1) that the requirement creates an impermissible trade-off between maternal health and fetal survival by mandating that the second physician take steps to save the aborted child even if such efforts increase the risk to the mother; and (2) that the requirement creates such a trade-off because it imposes time delays, increased expenses, or other factors adverse to the mother's health. The court finds that the plaintiffs have stated a claim on the basis of the first of these theories, as explained below in the main text of this memorandum opinion.

Moreover, the court finds that the second theory also

Alabama and Missouri provisions differ in the standards that govern the circumstances under which compliance with the second- physician-attendance requirement is waived. Under the Missouri statute, physicians need not comply with the requirement if the steps taken by the second physician merely "pose an increased risk" to the woman's life or health, while the analogous requirement in the Alabama act is waived only if compliance would "create a serious risk of substantial and irreversible impairment of a major bodily function." [44] Plainly, the Alabama act imposes a more restrictive standard on physicians, for even if the second physician's efforts to care for the aborted child do create an increased risk to the mother's health, those efforts must be undertaken, unless the

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supports a claim upon which relief may be granted. As explained more fully below in the context of the plaintiffs' challenges to the second-physician-concurrence and hospitalization requirements in the statute, the Supreme Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-39, 103 S.Ct. 2481, 2495-97, 76 L.Ed.2d 687 (1983), can be read in conjunction with Thornburgh to establish that an impermissible trade-off between maternal health and fetal survival results when a statute imposes delays upon a woman in medical need of a post-viability abortion, and thereby increases the risk of the procedure. Thus, the plaintiffs can prevail on this claim if they demonstrate that compliance with the second- physician-attendance requirement could result in an increased risk to the pregnant woman due to delays associated with securing the attendance of the second physician. Under such circumstances, the physician may be unable to ensure that the pregnant woman's health remain his paramount consideration, as required by Thornburgh, if he deems an immediate abortion to be less risky to the woman than one performed at a later time with the second physician present. Accordingly, in light of these considerations and the plaintiffs' allegations regarding the increase in risk associated with delays in obtaining medically-necessary abortions, the court concludes that the claim based upon this theory survives the attorney general defendants' motion to dismiss.

[44]Again, as explained above, the court assumes for the sake of addressing the plaintiffs' challenge to this requirement that the emergency exception is constitutional.

risk rises to a level of "serious risk of substantial and irreversible impairment of a major bodily function" of the woman.

In light of this distinction between the two abortion statutes, and the previously-discussed requirement that post-viability regulations not impose an impermissible trade-off between maternal health and fetal survival, the court concludes that the plaintiffs' challenge to the second-physician-attendance provision in the Alabama post-viability abortion statute survives the attorney general defendants' motion to dismiss.

Regarding the plaintiffs' allegations concerning the remaining requirements of the post-viability abortion statute, that a second physician concur in the necessity for the abortion, and that it be performed in a hospital, the court is aware of no instances in which the Supreme Court has addressed these types of provisions specifically in the context of post- viability abortions.[45] Rather, the Court has struck down second-

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[45]The district court in Voinovich did assess the constitutionality of a second physician concurrence provision in the post-viability context. See 911 F.Supp. at 1087-88. The court held that the plaintiff had demonstrated a substantial likelihood of success of establishing that the provision was unconstitutional, in view of the Supreme Court's decision in Doe v. Bolton, 410 U.S. 179, 199, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973). In Bolton, however, as explained below, the Court did not specifically address post-viability abortion regulations, but instead applied the Roe analytic scheme to regulations that governed all second- trimester abortions. Thus, this court is not convinced, as was the Voinovich district court, that the Bolton holding is dispositive in the post-viability realm.

Moreover, the Sixth Circuit, in affirming the district court's holding in Voinovich, did not reach this issue because it had already invalidated the entire post-viability abortion ban and regulations on the basis of infirmities in the medical necessity and emergency

physician-concurrence and hospitalization provisions that were directed generally to both pre and post-viability abortions under the Roe trimester- based analytic framework. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-39, 103 S.Ct. 2481, 2495-97, 76 L.Ed.2d 687 (1983) (striking hospitalization provision governing all second-trimester abortions); Ashcroft, 462 U.S. at 481-82, 103 S.Ct. at 2520 (same); Doe v. Bolton, 410 U.S. 179, 199, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973) (striking second-physician-concurrence provision applying to all abortions). The Supreme Court's holdings in these cases, therefore, are not dispositive of the instant dispute, because the standard applied by the Court did not take into account the state's strong post-viability interest in preserving potential life. Nonetheless, the Court's discussion of the pitfalls of hospitalization and second physician-concurrence provisions in the foregoing decisions is relevant to this court's determination of the constitutionality of the analogous provisions of Alabama's post-viability abortion statute.

As far as hospitalization requirements are concerned, the Supreme Court in Akron invalidated the one at issue in that case because, among other reasons, it found that the requirement that all second-trimester abortions be performed in hospitals, as opposed to outpatient clinics, imposed a substantial financial burden, and, in cases where travel would be required, additional health risks on a woman seeking an abortion.[46] Akron, 462 U.S. at 434- 35, 103 S.Ct. at 2495. The Court based these findings on data indicating that hospital-based abortions could cost more than twice as much as those

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exceptions. See Voinovich, 130 F.3d at 206.

[46]The Akron Court also found that the hospitalization requirement did not further the state's legitimate interest in preserving and protecting maternal health because advances in medical technology had made certain outpatient clinic abortions as safe as those performed in hospitals. Id., 462 U.S. at 437, 103 S.Ct. at 2496. This rationale, however, is at most remotely relevant to the Alabama statute at issue here, because it is the state's stronger interest in potential life that the hospitalization provision is designed to promote, according to the attorney general defendants.

performed in clinics, and evidence that few hospitals performed second-trimester abortions, increasing the likelihood that women would have to travel to find available facilities. Id.

The plaintiffs' allegations regarding the hospitalization requirement in the Alabama act echo the concerns of the Supreme Court in Akron. For instance, the plaintiffs allege that there is a shortage of hospitals that provide post- viability abortion services in Alabama, rendering compliance with this provision impossible or prohibitively expensive in certain circumstances, effectively denying some women any opportunity to obtain a desired--and sometimes medically necessary--post-viability abortion.

The court recognizes that the foregoing concerns expressed by the Supreme Court and the plaintiffs regarding the hospitalization requirements, to the extent that they do not focus on whether the requirements interfere with physicians' medical judgment regarding the necessity for a post- viability abortion, or whether they force an impermissible trade-off between women's health and fetal survival, are not relevant to the post-viability analysis undertaken here. Rather, insofar as these concerns focus on the obstacles erected by the hospitalization requirements to women seeking abortions, they are relevant to the undue burden analysis that is appropriate only in the context of pre-viability regulations. Despite this fact, the court nonetheless concludes that the plaintiffs have stated a claim that the hospitalization provision is unconstitutional. The precise basis for this conclusion bears further discussion.

As stated, one of the Supreme Court's grounds for invalidating the hospitalization requirement in Akron was that it would require women who sought post-viability abortions to travel to find facilities that would perform such abortions, and therefore to face any attendant health risks due to the resulting delay. This scenario, according to the plaintiffs' allegations, could also arise as a result of hospitalization requirement in Alabama's post- viability

abortion statute. If the plaintiffs demonstrate that this scenario is indeed a real possibility, they could prevail on their claim that the provision is unconstitutional because it imposes an impermissible trade-off between women's health and fetal survival, in violation of the Thornburgh standard. The reason for this is as follows: a woman who is in medical need of a post-viability abortion, and faces an increased risk to her health or life if the abortion is delayed due to travel, will nonetheless be compelled to travel to a hospital and incur the additional risk in order to have the abortion legally performed. The sole escape hatch would open only if a medical emergency arose, such that the woman faced death or a "serious risk of substantial and irreversible impairment" of her health.[47] This would indeed constitute a trade-off between maternal health and fetal survival, and would, in those cases where the physician deems an immediate abortion in an outpatient clinic to be less risky to the pregnant woman than one performed in a hospital at a later date, impede the physician's ability to ensure that maternal health remain his paramount consideration. Accordingly, the court concludes that this claim survives the attorney general defendants' motion to dismiss.

Regarding the final challenged procedural requirement, that the physician obtain the concurrence of a second physician in the necessity for the abortion, the court reiterates that in Bolton, the Supreme Court struck down a somewhat analogous statutory requirement that physicians performing abortions obtain the concurrence of two additional doctors that the abortion is medically necessary. See 410 U.S. at 198-200, 93 S.Ct. at 750-751. Noting that the defendants had cited no other voluntary medical procedure subjected by the state to such a two-physician concurrence provision, the Court faulted this requirement as lacking any rational connection to the patient's needs and as unduly infringing on the physician's right to practice. Id. at 199, 93 S.Ct. at 751.

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[47]Once again, as explained more fully above, the court assumes for the sake of addressing the plaintiffs' claim that the medical exception provision passes constitutional muster.

Importantly, as noted above, the abortion statute struck down in Bolton regulated pre-viability, as well as post-viability, abortions, and so the Court did not account for the state's strong post-viability interest in potential life when it invalidated the two-doctor concurrence requirement. By contrast, this court must evaluate the Alabama post-viability abortion statute in relation to the state's compelling interest, and so will uphold this provision so long as it reasonably furthers' that interest, see Ashcroft, 462 U.S. at 487, 103 S.Ct. at 2523, unless the plaintiffs can show that it impedes the attending physician's ability to ensure that maternal health remains his paramount consideration.

In view of the Bolton Court's misgivings about requiring doctors to obtain concurring opinions concerning the necessity of performing an abortion, this court is unwilling to conclude, as a matter of law, that the Alabama statute's second physician concurrence provision reasonably furthers the state's interest in potential life without impermissibly undermining the attending physician's ability to devote his primary attention to safeguarding the pregnant women's health. If the plaintiffs can establish that this provision unduly increases the medical risks faced by women who require post- viability abortions by, for instance, imposing substantial delays on the process or discouraging certain physicians from performing such abortions, they may prevail on the merits of this challenge at trial.[48] Accordingly, the court finds that the plaintiffs have stated a claim regarding the alleged unconstitutionality of the Alabama post-viability abortion statute's second-physician-concurrence requirement.

VI. CONCLUSION

For the foregoing reasons, the court will deny the motion to dismiss filed by the governor. The court will grant

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[48]Needless to say, the court takes no position concerning whether facts such as these would actually permit the plaintiffs to prevail on this issue on the merits. Rather, these examples are offered purely to explain the court's conclusion that this challenge survives the attorney general defendants' motion to dismiss.

the attorney general defendants' motion to dismiss to the following extent: (a) as to all of the plaintiffs' claims to the extent that the plaintiffs seek issuance of an injunction against the operation and enforcement of the challenged Alabama abortion statutes (Complaint ¶¶ 81 through 84); and (b) as to the plaintiffs' claim that the post-viability statute is unconstitutionally vague with respect to how physicians are to determine whether a fetus is viable (Complaint ¶¶ 75 & 76).

The court will deny the attorney general defendants' motion to dismiss to the extent the plaintiffs allege the following: (a) that the post-viability statute is unconstitutionally vague as to how physicians are to determine whether an abortion is necessary to prevent the death of the woman or the substantial and irreversible impairment of her health (Complaint ¶¶ 75 & 76); (b) that the post-viability statute is unconstitutionally vague as to how physicians are to determine whether a medical emergency prevents compliance with the statute's procedural requirements for conducting and documenting the abortion (Complaint ¶¶ 77 & 78); (c) that the partial-birth abortion statute is unconstitutional even if limited to post-viability abortions because it lacks any exception for preserving maternal health (Complaint ¶¶ 69 & 70); (d) that the partial birth abortion statute is unconstitutional because its civil liability provisions impose an undue burden on women seeking pre-viability abortions (Complaint ¶¶ 71 through 74); and (e) that the post-viability statute is unconstitutional because it impermissibly forces a "trade-off" between the woman's health and fetal survival, and fails to ensure that maternal health remain the physician's paramount concern (Complaint ¶¶ 77 & 78).

In addition, the court will certify the following questions to the Supreme Court of Alabama pursuant to Rule 18 of the Alabama Rules of Appellate Procedure: (a) What is the meaning of "living fetus" as that term is used in the definition of "partial-birth abortion" provided in § 26-23-2(3) of the partial-birth abortion statute? (b) What specific abortion procedures constitute "partial-birth abortions" as that term is defined in § 26-23-2(3) of the partial-birth abortion statute

and so are banned in § 26-23-3 of the statute? More specifically, which, if any, of the abortion techniques set forth in ¶¶ 36 through 41 of the plaintiffs' complaint, namely traditional dilation and evacuation, intact dilation and evacuation, saline induction, urea induction, prostaglandin induction, hysterotomy and hysterectomy, are proscribed by the statute because they constitute "partial-birth abortions"? (c) In "viability testing" under § 26-22-4 of the post-viability statute does fetal age, for purposes of determining whether a woman is past "her first 19 weeks of pregnancy," commence with fertilization or the first day of the woman's last menstrual period?

Finally, the court will deny the attorney general defendants' motion to dismiss to the extent the plaintiffs allege the following claims, but with leave to renew the motion to dismiss if appropriate after the Alabama Supreme Court has answered the certified questions: (a) that the partial-birth abortion statute is unconstitutionally vague as to which types of abortion procedures it proscribes (Complaint ¶¶ 63-64); (b) that the partial-birth abortion statute is unconstitutionally vague as to what is meant by a "living fetus" (Complaint ¶¶ 63-64); (c) that the post-viability statute is unconstitutionally vague as to when fetal age, for purposes of determining whether a woman is past "her first 19 weeks of pregnancy," commences; and (d) that the partial-birth abortion statute unconstitutionally imposes an undue burden on women seeking pre-viability abortions, to the extent that it prohibits the most common and safest abortion procedures, and to the extent that it imposes a substantial obstacle on women's choice of abortion method (Complaint ¶¶ 67 & 68).

An appropriate order will be entered.

APPENDIX C

SUMMIT MEDICAL ASSOCIATES, P.C., et al., Plaintiffs,

v.

Fob JAMES, Jr., et al., Defendants.

No. CIV. A. 97-T-1149-N.

United States District Court,

M.D. Alabama,

Northern Division.

March 19, 1998.

ORDER

MYRON H. THOMPSON, Chief Judge.

This lawsuit, in which the plaintiffs, Alabama-based providers of abortion services, challenge the constitutionality of two recently-enacted Alabama abortion statutes under the fourteenth amendment to the United States Constitution, is presently before the court on a motion to stay proceedings pending appeal, filed by defendants Bill Pryor, the Attorney General of the State of Alabama, and Ellen Brooks, the Montgomery District Attorney, (collectively, the "attorney general defendants"). The attorney general defendants seek a stay of all proceedings before this court, pending resolution of their appeal of this court's order, entered January 26, 1998, denying the attorney general defendants' motion to dismiss on the ground of eleventh amendment immunity. See Summit Medical Assocs. v. James, 984 F.Supp. 1404 (M.D.Ala.1998). For the reasons that follow, the court will grant the attorney general defendants' motion and stay all proceedings in this cause pending appeal.

I. BACKGROUND

The facts of this lawsuit, as alleged by the plaintiffs, are set out in the court's memorandum opinion entered January 26, 1998. In brief, the plaintiffs' challenges are leveled against two Alabama abortion statutes. The first is the Alabama Partial-Birth Abortion Ban Act of 1997, 1975 Ala.Code §§ 26-23-1 to 26-23-6 (Law.Co-op.Supp.1997), which took effect on August 1, 1997, and proscribes what it terms "partial-birth abortions," except under certain medical emergency circumstances. The second statute, the Alabama Abortion of Viable Unborn Child Act, 1975 Ala.Code §§ 26-22-1 to 26-22-4 (Law.Co- op.Supp.1997), took effect on August 12, 1997, and proscribes abortions performed after the fetus has achieved "viability." The plaintiffs seek declaratory and injunctive relief and have named as defendants the Governor of the State of Alabama, the Attorney General of the State of Alabama, and the Montgomery District Attorney, in her official capacity and as a representative of the class of district attorneys for the State of Alabama.

On September 4, 1997, the governor and the attorney general defendants filed separate motions to dismiss the lawsuit. The only issue raised in these motions relevant to the present motion to stay proceedings is the attorney general defendants' argument that the lawsuit must be dismissed in its entirety because the plaintiffs' claims are barred by the eleventh amendment to the United Stated Constitution, which immunizes all of the named defendants from suit. In its memorandum opinion and order dated January 26, 1998, the court rejected this argument and held that it may exercise jurisdiction over the plaintiffs' claims because they fall within the longstanding exception to eleventh amendment immunity, first articulated by the United States Supreme Court in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law. See Summit Medical Assocs., 984 F.Supp. at 1420-25. For purposes of the present motion, a brief discussion of the grounds for this holding is warranted.

In essence, the attorney general defendants proffered

two primary arguments in support of their motion to dismiss on eleventh amendment grounds. First, they contended that although the plaintiffs seek purely prospective relief against the defendants, and so this lawsuit arguably falls within the purview of the Ex parte Young doctrine, the specific relief sought is sufficiently intrusive and connected to the state itself that the 'fiction' worked by that doctrine is inapplicable here. Their second primary argument was grounded on the Ex parte Young doctrine's requirement that the challenged conduct of the state officials be 'ongoing' or 'continuing,' and not merely 'threatened,' for the exception to apply. The attorney general defendants maintained that the plaintiffs face, at most, a speculative threat of prosecution under the statutes, and that consequently their claims do not qualify for the Ex parte Young exception.

The court rejected both of these arguments, and held instead that this lawsuit conforms to the prototypical one in which the Ex parte Young exception applies, where state officials are sued in their official capacities for prospective relief calculated to prohibit them from enforcing an allegedly unconstitutional state law. Summit Medical Assocs., 984 F.Supp. at 1422. Furthermore, the court concluded that the plaintiffs had alleged the requisite 'ongoing or continuing violation' of their constitutional rights, by contending that they face a continuing threat of prosecution and civil liability under the two challenged abortion statutes, in view of the governor and attorney general's indication that they intend to prosecute violations of the two statutes. Id. at 1423. In reaching its decision, the court emphasized that as a consequence of the ongoing threat of prosecution the plaintiffs cannot freely exercise their asserted constitutional rights without fear of arrest, prosecution, or being haled into court pursuant to the acts' civil provisions. Finally, the court also remarked that to the extent that the attorney general defendants take the position that the plaintiffs must await a state criminal prosecution to secure their desired relief, their argument flies in the face of one of the central rationales underlying the Ex parte Young decision, namely that the plaintiffs should not be compelled to await a state court criminal prosecution, with its attendant risk of heavy sanctions, to vindicate their constitutional rights. Id. at 1424-

25.

On February 13, 1998, the attorney general defendants filed a timely notice of appeal from this court's denial of their motion to dismiss on the grounds of eleventh amendment immunity. On that same date, they filed the motion to stay proceedings that is presently before the court. The court held a telephone conference concerning this motion on March 5, 1998.

II. DISCUSSION

A.

As both parties recognize, a court of appeals may exercise jurisdiction over an interlocutory appeal by a defendant from a denial of a motion to dismiss grounded on a claim of eleventh amendment immunity. See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). Among the reasons underlying this principle is the notion that "the value to the States of their Eleventh Amendment immunity ... is for the most part lost as litigation proceeds past motion practice." Id. at 145, 113 S.Ct. at 688. Thus, providing state and state-official defendants with swift access to appellate review of denials of eleventh-amendment-immunity claims acknowledges that the principal benefits of eleventh amendment immunity to suit--namely "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial"--perish irretrievably when a case is erroneously permitted to proceed to trial. Id. at 143-44, 113 S.Ct. at 687.

These same considerations also favor granting a stay of the trial court proceedings pending resolution of such an interlocutory appeal, as the Seventh Circuit--the only court of appeals to have addressed this question--recently held in Goshtasby v. Board of Trustees of Univ. of Ill., 123 F.3d 427 (7th Cir.1997). In Goshtasby, the Seventh Circuit extended to the eleventh- amendment-immunity context the reasoning underlying its prior decision in Apostol v. Gallion, 870 F.2d 1335 (7th Cir.1989), which held that a stay of proceedings in

the district court is required where a public official takes an interlocutory appeal to assert a non-frivolous claim to absolute or qualified immunity. As the Goshtasby court explained,

"Our reason [for requiring a stay in Apostol] was not any formal division of 'jurisdiction' between trial and appellate courts--for an appeal from an interlocutory order may endow both courts with authority over discrete portions of the case--but the fact that immunity gives a public official a 'right not to be sued' as well as a right to win on the merits.... [I]f the defendant is correct that it has immunity, its right to be free of litigation is compromised, and lost to a degree, if the district court proceeds while the appeal is pending. Just so with an appeal by a state under the eleventh amendment."

123 F.3d at 428 (emphasis added).

Although, for the foregoing reasons, a stay of trial court proceedings is appropriate pending a colorable appeal taken by a state official on eleventh-amendment-immunity grounds, when the appeal is plainly frivolous, as where the claim of immunity is a sham and asserted solely for the purpose of delay, the trial court need not halt the proceedings. As the Apostol court recognized, "Courts are not helpless in the face of manipulation. District judges lose power to proceed with trial because the defendants' entitlement to block trial is the focus of the appeal. If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks." 870 F.2d at 1339. See also Chuman v. Wright, 960 F.2d 104, 105 (9th Cir.1992) (holding that the district court may certify as frivolous interlocutory appeals on immunity grounds, and proceed to trial); accord Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir.1991); Stewart v. Donges, 915 F.2d 572, 576-78 (10th Cir.1990).

Although the Eleventh Circuit Court of Appeals has not yet addressed the present question of whether a stay should be granted pending a non-frivolous appeal on eleventh-amendment-immunity grounds, the court perceives no reason why that court would not adopt the rationale underlying the Seventh Circuit's Goshtasby decision and hold

that a stay is warranted under these circumstances. As the attorney general defendants point out, the Eleventh Circuit has noted that eleventh amendment immunity is "a threshold issue" which should be resolved at an early stage of the proceedings, and that the eleventh amendment "is a recognition that the states retain certain attributes of sovereignty, and one of its purposes is to protect states from the indignity of being haled into federal court by private litigants." In re Bouchard Transp. Co., 91 F.3d 1445, 1448 (11th Cir.1996) (citing Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S.Ct. at 687). The Eleventh Circuit in Bouchard reversed the district court's decision to order a state agency to participate in mediation without first addressing the agency's claim of eleventh amendment immunity from suit. 91 F.3d at 1449. Because the considerations underlying Bouchard also favor the granting of a stay pending an interlocutory appeal based on eleventh amendment immunity, as previously explained, it is reasonable to conclude that the Eleventh Circuit, if confronted by the present issue, would require that a stay be granted absent a finding that the appeal is frivolous.

For the foregoing reasons, this court concludes that unless it finds that the attorney general defendants' appeal is wholly frivolous and brought solely for purposes of delay, a stay of all proceedings in this court pending resolution of the appeal is appropriate.

B.

The parties do not contest the applicability of the foregoing authorities to the present issue. Instead, their dispute arises over whether the attorney general defendants' appeal is frivolous and brought solely for purposes of delay. The plaintiffs contend that because this lawsuit falls squarely within the exception to sovereign immunity carved out by Ex parte Young, as this court held in its January 13, 1998, memorandum opinion, there is no non-frivolous basis upon which the attorney general defendants may assert on appeal that the plaintiffs' suit is barred by the eleventh amendment. The attorney general defendants counter by reiterating their argument, which was previously rejected by this court, that

the plaintiffs have failed to satisfy Ex parte Young 's 'ongoing or continuing violation' requirement, because no individual is or has ever been the target of an imminent prosecution under the two challenged abortion acts.

The court holds that the attorney general defendants' appeal is not frivolous. However, because the eleventh amendment issue presented by this lawsuit appears to have engendered some confusion, as evidenced by the attorney general defendants' arguments proffered in support of their stay motion, the court offers a few additional words on the question of the applicability of the Ex parte Young doctrine to this suit.

As a threshold matter, the court emphasizes once again its holding that this lawsuit falls squarely within the Ex parte Young exception to eleventh amendment immunity. As the court explained in its January 26, 1998, memorandum opinion, the plaintiffs here seek purely prospective relief against state officials in their official capacities, and the requested relief is calculated to prohibit the officials from enforcing allegedly unconstitutional state enactments. Summit Medical Assocs., 984 F.Supp. at 1422. Thus, this lawsuit conforms to the prototypical case contemplated by Ex parte Young and its progeny, in terms of the nature of the relief sought. Id. In no way do the plaintiffs seek retrospective relief in any form, nor do they attempt to wrest control of a vital state resource permanently away from Alabama, thus impermissibly offending the state's sovereignty, as the Supreme Court found to be the case in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Summit Medical Assocs., 984 F.Supp. at 1421-22.

The principal source of confusion in this case stems not from the foregoing considerations, but rather from the attorney general defendants' attempt to establish that the plaintiffs have failed to satisfy what the parties and court have been referring to as Ex parte Young 's 'ongoing or continuing violation' requirement. Accordingly, the court will focus its discussion here on this particular facet of the eleventh amendment issue.

Unquestionably, the Supreme Court has emphasized that only 'ongoing' or 'continuing' alleged violations of federal law by a state official trigger the application of the Ex parte Young exception. See, e.g., Coeur d'Alene, 521 U.S. at ----, 117 S.Ct. at 2043 ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court.") (emphasis added); Papasan v. Allain, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986) (noting that Ex parte Young "has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past") (emphasis added); Green v. Mansour, 474 U.S. 64, 67-68, 106 S.Ct. 423, 425-426, 88 L.Ed.2d 371 (1985) ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.") (emphasis added). However, in asserting that the plaintiffs here cannot allege the requisite 'ongoing or continuing' federal law violation because no non-conjectural threat of prosecution or civil liability presently exists, the attorney general defendants misconstrue how these terms are employed by the Supreme Court in the eleventh-amendment-immunity context. Specifically, as the court noted in its previous memorandum opinion, see Summit Medical Assocs., 984 F.Supp. at 1422-24, and as it explains in more detail below, the attorney general defendants impermissibly seek to inject into the eleventh amendment analysis considerations that are applicable only to the separate questions of whether the plaintiffs have satisfied the Article III case-or-controversy requirement and whether the court, under principles of equity jurisprudence, should exercise jurisdiction over the plaintiffs' claims for declaratory and injunctive relief.

To fully appreciate how the attorney general defendants have misconstrued the 'ongoing and continuing violation' requirement, one must understand the relationship between this requirement, the concerns of federalism and comity that underlie the Ex parte Young doctrine, and the distinct justiciability and equity considerations that

circumscribe federal courts' ability to exercise jurisdiction over plaintiffs' claims for relief against the allegedly unconstitutional enforcement of state enactments. A useful scheme for analyzing this relationship emerges when one focuses on the type of federal-law violation that is alleged in a particular lawsuit, because, as will be shown, different considerations apply depending on the nature of the alleged violation.

For purposes of the present analysis, alleged violations of federal law by state officials may be described as falling within one or more of three separate categories, specifically 'past/completed,' 'ongoing or continuing,' and 'speculative/conjectural.' The relationship between these three categories of alleged federal-law violations may be depicted in schematic form as follows:

The first category, 'past/completed,' refers to violations by state officials that have occurred only in the past; that is, violations based upon conduct that entirely pre-dates and does not extend beyond the initiation of the plaintiffs' lawsuit. The second category, 'ongoing or continuing,' is employed here as it consistently has been employed by the Supreme Court in the eleventh-amendment-immunity context, namely to refer to violations that do not entirely pre-date the initiation of the lawsuit. In other words, this court, like the Supreme Court, defines 'ongoing or continuing' in direct contradistinction to 'past/completed' violations, the cardinal difference between the two categories being that the former refers to infractions that did not take place wholly in the past. See Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940 ("Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past.") (emphasis added). The third, and final, category, 'speculative/conjectural,' denotes violations that have not commenced at the time of filing, and for which there is no credible threat of future occurrence, beyond mere speculation or conjecture. Thus, where an alleged violation is taking place at the time that the lawsuit is initiated, or where there is a real and immediate threat that a violation of federal law

will occur in the near future, the lawsuit involves an 'ongoing or continuing' violation. By contrast, where the plaintiffs cannot establish a credible threat of future violation, so that the court finds the putative threat to be merely hypothetical or imaginary, the suit alleges a 'speculative/conjectural' violation of federal law.

In addition to these three categories of alleged federal law violations, two vertical lines are depicted in the schematic diagram. One line separates 'past/completed' from 'ongoing or continuing' violations, while the second line separates the latter from 'speculative/conjectural' violations. As will be shown, while the issues associated with each of these lines are implicated by the present lawsuit, the appeal on eleventh-amendment-immunity grounds raises only the issues pertaining to the first line of the schematic diagram. Moreover, any confusion in this suit regarding whether the plaintiffs have satisfied the 'ongoing or continuing violation' requirement may be traced to the attorney general defendants' conflation of the distinct issues associated with the diagram's two lines.

i. The First Vertical Line: Eleventh Amendment Sovereign Immunity Considerations

The determination of where a lawsuit falls in relation to the first line on the court's schematic diagram, which separates 'past/completed' from 'ongoing or continuing' violations, governs whether the Ex parte Young exception to eleventh amendment immunity permits plaintiffs to bring the lawsuit against state officials in federal court. As stated, the Supreme Court has made it clear that only lawsuits in which 'ongoing or continuing' violations of federal law are alleged, as opposed to those alleging violations that occurred solely in the past, do not run afoul of the comity and federalism concerns that lie at the heart of the eleventh amendment, and therefore do not exceed the permissible boundaries of the Ex parte Young exception.

The Supreme Court has, in several decisions, explained why the applicability of the Ex parte Young exception turns on whether or not the alleged violations of

federal law occurred wholly in the past. The Court's observations in two such decisions, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-06, 104 S.Ct. 900, 909-11, 79 L.Ed.2d 67 (1984) and Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940, are particularly illuminating, and so warrant further examination here.

In Pennhurst, the Supreme Court addressed the question of whether a claim that state officials violated state law is one against the state and therefore barred by the eleventh amendment. 465 U.S. at 103, 104 S.Ct. at 909. In the course of deciding this question, the Court addressed in some detail the rationale underlying the Ex parte Young doctrine, and made the following observations, which shed some light on the issue presently before this court. The Pennhurst Court first remarked that the doctrine, despite its transparently fictional quality, "has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " Id. at 105, 104 S.Ct. at 910 (quoting Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454). However, the Court was quick to add that it had recognized that this need "must be accommodated to the constitutional immunity of the States," and therefore that in prior instances it had "declined to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate" that immunity. Id.

Thus, the Supreme Court recognized that it had established a fundamental distinction for eleventh-amendment-immunity purposes between prospective and retroactive relief. This distinction, according to the Court, "fulfills the underlying purpose of Ex parte Young while at the same time preserving to an important degree the constitutional immunity of the States." Id. at 106, 104 S.Ct. at 911. In other words, by permitting application of the Ex parte Young exception only where the relief sought against state officials is prospective, rather than where plaintiffs seek compensation for a past violation of federal law, the Court believed that it had achieved the proper balance between competing state and federal interests.

In Papasan, the Supreme Court further elaborated

on the necessity of achieving such an equilibrium. Papasan contains what is perhaps the Court's clearest explanation of the relationship between the 'ongoing or continuing violation' requirement and what this court terms 'past/complete' conduct. Remarking once again upon the proper boundaries for application of the Ex parte Young doctrine, the Papasan Court made the following pertinent observations:

"We have ... described certain types of cases that formally meet the Young requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies. Young 's applicability has been tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. Consequently, Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.... Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."

Papasan, 478 U.S. at 277-78, 106 S.Ct. at 2940 (internal quotation marks and citations omitted). Thus, the Papasan Court unambiguously explained that the term 'ongoing,' as employed in the eleventh-amendment- immunity context, refers to an alleged violation that did not take place entirely in the past. As the Court explained, permitting a suit for such a violation in federal court would serve to compensate individuals for previously incurred damages, or to deter states from violating federal law by holding out the threat of such liability for future transgressions, neither of which is a sufficient interest to overcome the dictates of the eleventh amendment. Id. at 278, 106 S.Ct. at 2940.

Thus, as the Supreme Court's decisions in Pennhurst and Papasan demonstrate, the principles of state sovereign immunity embodied in the eleventh amendment are offended--and the Ex parte Young exception is stretched beyond the breaking point--when plaintiffs attempt to challenge state officials' acts that have taken place wholly in the past. The reason for this is quite simple: such challenges, by their very nature, implicate retroactive, as opposed to prospective, relief, including monetary damages, and therefore must be barred from federal court if the eleventh amendment "is to be conceived of as having any present force." Edelman v. Jordan, 415 U.S. 651, 665, 94 S.Ct. 1347, 1357, 39 L.Ed.2d 662 (1974). In this sense, the Supreme Court employs the terms 'ongoing' and 'continuing' as a short-hand reference to alleged violations that may be remedied through an award of prospective relief to end current, or prevent future, injury to plaintiffs' federally-protected rights, as opposed to violations that may be remedied only by an award of retroactive relief calculated to compensate plaintiffs for injuries suffered in the past.

Returning to its schematic diagram, the court re-iterates that the foregoing discussion was focused on the first vertical line, which separates 'past/completed' from 'ongoing or continuing' violations. As explained, when the state officials' challenged actions have only taken place in the past, and thus the lawsuit falls on the 'past/complete' side of the line, principles of federalism and comity preclude the application of the Ex parte Young exception because the federal interests vindicated, namely the awarding of compensation for past damages and the possible deterrence of future violations of federal strictures, do not justify the injury to state sovereign rights inflicted by the exception. By contrast, a different outcome, favoring application of the exception, arises where the alleged violations fall on the 'ongoing or continuing' side of the first vertical line, because an exercise of federal jurisdiction under such circumstances would carry only prospective force, and therefore would vindicate federal interests while according sufficient deference to the state's sovereign immunity.

Thus, if the court finds that the plaintiffs' lawsuit falls on the 'ongoing or continuing' side of the first line of

the schematic diagram, in light of the foregoing considerations, the Ex parte Young exception is applicable, and any subsequent analysis no longer revolves around the eleventh amendment. Instead, at this point the court leaves the domain of the eleventh amendment and moves on to the diagram's second line, to determine whether the alleged violations of federal law are speculative or conjectural. This determination is the focus of the next section of this order.

ii. The Second Vertical Line: Article III and Equity Considerations

The analysis associated with the second line on the court's schematic diagram, which separates the 'ongoing or continuing' and 'speculative/conjectural' categories of alleged violations, involves a very different set of constitutional doctrines from those just discussed in relation to the first vertical line. Specifically, the assessment of where a lawsuit falls with respect to the second line determines whether the plaintiffs have met the Article III standing requirement, as well as whether the court should, under traditional principles of equity, exercise jurisdiction over the plaintiffs' requests for declaratory and injunctive relief.

As the court explained in its January 26, 1998, memorandum opinion, Article III's standing requirement imposes an additional constitutional barrier, distinct from that erected by the eleventh amendment, to litigants who attempt to bring suit in federal court. See Summit Medical Assocs., 984 F.Supp. at 1423-24, 1425. This requirement is satisfied only if the party alleges that it has suffered an actual or threatened injury as a result of the defendant's actions. See id. at 1426. Where, as here, the lawsuit challenges a state criminal enactment, to establish standing the plaintiffs must allege " 'an intention to engage in a course of conduct arguably infected with a constitutional interest, and [that] there exists a credible threat of prosecution thereunder." ' Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979)).

It is the latter aspect of this requirement, the demonstration of a credible threat of prosecution, that is at

issue at the second vertical line of the court's schematic diagram. As the court explained in its previous memorandum opinion, a credible threat cannot be merely imaginary or speculative, but must be "real and immediate." See id. Thus, if the alleged violation falls on the 'speculative/conjectural' side of the second line, a federal court may not exercise jurisdiction over the plaintiffs' claim, under basic principles of standing. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 103 S.Ct. 1660, 1667, 75 L.Ed.2d 675 (1983) (holding that plaintiffs lacked standing because they failed to allege a credible threat of injury, where the recurrence of such injury depended upon two speculative events); Golden v. Zwickler, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (holding that plaintiff lacked standing because it was "wholly conjectural" that any future prosecutions would be advanced against him under a challenged statute). However, where, as the court found to be the case here, the plaintiffs establish a credible threat of prosecution by alleging that their conduct falls within the proscriptions of the challenged statutes and that the state officials stand ready to enforce the statutes against them, the standing hurdle has been surmounted, and the court may exercise jurisdiction over the plaintiffs' claims.

In addition to the standing issue, the second vertical line on the court's schematic diagram has significance with respect to the separate question of whether the court may exercise its jurisdiction over the plaintiffs' claims for equitable relief. As the Supreme Court has observed, the considerations governing whether the standing requirement has been satisfied "obviously shade into those determining whether the complaint states a sound basis for equitable relief." O'Shea v. Littleton, 414 U.S. 488, 499, 94 S.Ct. 669, 677, 38 L.Ed.2d 674 (1974). Thus, in the present context of a challenge to state criminal statutes, the plaintiffs must demonstrate the existence of a credible threat of prosecution under the statutes not only to establish their standing to sue, but also to qualify for federal injunctive relief. See Morales v. Trans World Airlines, 504 U.S. 374, 381-383, 112 S.Ct. 2031, 2035-36, 119 L.Ed.2d 157 (1992).

Unfortunately, the attorney general defendants fail to recognize that the relevance of this determination of

whether a credible threat of enforcement exists is restricted to the standing and equity considerations that arise at the second vertical line of the court's schematic diagram, and does not extend to the eleventh-amendment-immunity issue associated with the first vertical line and raised by their appeal to the Eleventh Circuit. This misapprehension of the governing law is most evident in the attorney general defendants' reliance upon the Supreme Court's decision in Morales to support their contention that the plaintiffs have failed to satisfy Ex parte Young ' s 'continuing or ongoing violation' requirement because they have not demonstrated the existence of a credible threat of prosecution under the challenged abortion statutes. Morales, as will be shown, pertains only to the equitable-relief issue, and not at all to the question of whether the eleventh amendment bars certain lawsuits against state officials. Consequently, the attorney general defendants improperly blend two distinct and unrelated concepts when they rely upon Morales to establish that the plaintiffs suit does not fall within the Ex parte Young exception to eleventh amendment immunity.

In Morales, the Court considered the scope of federal injunctive relief available where plaintiffs challenge state regulations that they claim to be pre-empted by federal law. The Morales Court vacated the injunction entered below by the district court to the extent that it restrained the operation of challenged state laws with respect to matters that were outside the specific obligations that several state attorneys general had threatened to enforce against the plaintiffs. 504 U.S. at 381-383, 112 S.Ct. at 2035-36. In reaching its decision, the Morales Court addressed the propriety of granting federal injunctive relief where state enactments are being challenged, in an extended discussion that the attorney general defendants have quoted at length in their brief in support of their stay motion. The pertinent passage reads, in part, as follows:

"It is a ' "basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." ' O'Shea v. Littleton, 414 U.S. 488, 499, 94 S.Ct. 669, 677-678, 38 L.Ed.2d 674 (1974); Younger v. Harris, 401 U.S. 37, 43-44, 91 S.Ct. 746, 750-751,

27 L.Ed.2d 669 (1971). In Ex parte Young, 209 U.S. 123, 156, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908), we held that this doctrine does not prevent federal courts from enjoining state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution.' When enforcement actions are imminent--and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses--there is no adequate remedy at law. See id., at 145-147, 163-165, 28 S.Ct., at 447-449, 455-456....

"In suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury. See Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 240-241, 73 S.Ct. 236, 238-239, 97 L.Ed. 291 (1952). Ex parte Young thus speaks of enjoining state officers 'who threaten and are about to commence proceedings,' 209 U.S., at 156, 28 S.Ct., at 452 (emphasis added); see also id., at 158, 28 S.Ct., at 453, and we have recognized in a related context that a conjectural injury cannot warrant equitable relief, see O'Shea, supra, 414 U.S., at 502, 94 S.Ct., at 679. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted 'any' state suit involving 'any aspect' of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters."

Morales, 504 U.S. at 381-383, 112 S.Ct. at 2035-36 (footnote omitted).

As this passage illustrates, the Morales Court did not

concern itself with whether the eleventh amendment precluded a federal-court challenge to a state enactment. Instead, as even a casual reading of the decision reveals, Morales addressed the question of whether, consistent with the "basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," the plaintiffs had alleged a sufficient threat of enforcement to establish the requisite irreparable injury and inadequacy of legal remedies so that the federal court properly could grant injunctive relief. 504 U .S. at 380-81, 112 S.Ct. at 2035.[1]

Thus, the relevance of Morales, though the Court does extensively quote from Ex parte Young,[2] does not extend beyond the equity-based considerations that arise at the second vertical line of this court's schematic diagram. In other words, the decision sheds no light on the eleventh-amendment-immunity issue associated with the first line, and the statements in Morales regarding the necessity of an imminent threat of prosecution under the challenged state statutes are pertinent only to the question of whether federal injunctive relief, under basic principles of equity, is available

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[1]In fact, this court cited Morales in its previous memorandum opinion specifically for the proposition that it must examine whether jurisdiction may be exercised over the plaintiffs' claims for equitable relief based upon the application of traditional equity principles, in an analysis that is separate from that pertaining to the eleventh amendment question that is also raised by this lawsuit. See Summit Medical Assocs., 984 F.Supp. at 1434.

[2]It is clear that the Morales Court relied upon the quoted portions of Ex parte Young to establish not that the state-sovereignty principles embodied in the eleventh amendment preclude suits against state officials in federal court, but rather as support for its conclusion that federal injunctive relief is available against state officials only when those officials actually threaten to enforce allegedly unconstitutional state enactments. See Morales, 504 U.S. at 381-83, 112 S.Ct. at 2035-36. The Morales Court was apparently not confronted with, and so did not reach, the former question.

to a plaintiff who sues state officials.

As stated, the attorney general defendants fail to recognize this fundamental limitation of Morales when they rely upon the decision to argue that the present lawsuit does not fall within the Ex parte Young exception because the plaintiffs do not allege an 'ongoing or continuing' violation of federal law. In this manner, the attorney general defendants conflate the considerations governing the first vertical line's eleventh amendment considerations and the second vertical line's equity-based considerations.[3]

The attorney general defendant's continued reliance upon another Supreme Court decision, Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926), to argue against application of the Ex parte Young exception in this lawsuit, is similarly misplaced. Despite the fact that the Fenner Court did discuss Ex parte Young in reaching its decision that federal courts may enjoin state officials from initiating criminal prosecutions only under extraordinary circumstances, an examination of the opinion establishes that the Court was not concerned at all with the question of whether the eleventh amendment barred such lawsuits. Instead, as was true in Morales, the Fenner Court addressed only the propriety of granting federal injunctive relief against an imminent state prosecution. Moreover, as this court explained in its January 26, 1998, memorandum opinion, the Supreme Court has come to employ the reasoning underlying Fenner to determine

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[3]Furthermore, regarding the question of whether a sufficient threat of enforcement has been alleged in this case--to which the Morales opinion is indeed relevant--the court re-iterates its previous conclusion that the two challenged statutes are viable, and not moribund. See Summit Medical Assocs., 984 F.Supp. at 1427, 1435. During the March 5, 1998, hearing that this court held on the stay motion, the attorney general and governor underscored this fact once again by confirming, in no uncertain terms, that any violations of the acts that come to the attorney general's attention will be subject to prosecution pursuant to the appropriate statute, even while a stay of these proceedings is in effect pending resolution of the appeal to the Eleventh Circuit.

whether federal courts should abstain from hearing lawsuits where the exercise of federal jurisdiction could potentially interfere with related state-court proceedings. See Summit Medical Assocs., 984 F.Supp. at 1433-34 & n. 16. Thus, the Court has never interpreted Fenner as providing guidance regarding whether or not the Ex parte Young exception should be applied to overcome the eleventh amendment's strictures. In addition, as this court also observed in its previous memorandum opinion, while the expansive language in Fenner may superficially appear to govern the present lawsuit, the Supreme Court has explained that Fenner is instead applicable " 'in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution for past conduct.' " Id. at 1434 (quoting Steffel v. Thompson, 415 U.S. 452, 463 n. 12, 94 S.Ct. 1209, 1218 n. 12, 39 L.Ed.2d 505 (1974) (emphasis in original)).

Thus, as the foregoing discussion indicates, the attorney general defendants' arguments regarding the plaintiffs' alleged failure to show that they face an imminent and credible threat of prosecution under the two challenged abortion statutes are completely irrelevant to the eleventh-amendment-immunity issue that they raise on appeal. Because this court has concluded that the plaintiffs' lawsuit alleges violations of federal law that have not occurred solely in the past, that is, prior to the filing of their complaint, they have satisfied the 'ongoing or continuing violation' requirement imposed by Ex parte Young, and the eleventh amendment poses no bar. By contrast, the attorney general defendants' contentions regarding the lack of an imminent prosecution are, of course, directly relevant to the distinct questions of whether the plaintiffs enjoy standing to sue in federal court and whether this court should entertain their claims for equitable relief; however, these questions, while they have been hotly disputed by the parties and were decided by the court in the plaintiffs' favor in the January 26, 1998, memorandum opinion, are not implicated by the attorney general defendants' appeal to the Eleventh Circuit.

C.

Despite its conclusion that the plaintiffs' claims fall

squarely within the Ex parte Young exception to eleventh amendment immunity, which is undisturbed by the attorney general defendants' contention that the alleged lack of a credible threat of prosecution under the statutes should bar this lawsuit from federal court, the court does recognize that the attorney general defendants have raised colorable arguments regarding the scope of the exception that have not yet been answered by any appellate court in the wake of the Supreme Court's recent decision in Coeur d'Alene. Although, as explained more fully in its memorandum opinion of January 26, 1998, this court disagrees with the attorney general defendants' expansive reading of Coeur d'Alene, it cannot conclude that they have so misinterpreted that decision that their arguments are wholly without merit and brought solely as a delay tactic. Nor does the court find frivolous the attorney general defendants' arguments regarding the 'ongoing or continuing violation' requirement under Ex parte Young and its progeny. Consequently, the court rejects the plaintiffs' argument that the attorney general defendants' appeal on eleventh amendment grounds is wholly frivolous and brought solely for purposes of delay, and finds instead that the stay motion is due to be granted.[4]

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[4]The plaintiffs also oppose the attorney general defendants' motion by arguing that no stay should be granted as to their claims against the governor, because he has not asserted an eleventh-amendment-immunity defense and thus has not joined the attorney general defendants' appeal. The court rejects this argument, however. As the attorney general defendants correctly observe, a decision by the Eleventh Circuit that the plaintiffs' claims are barred by the eleventh amendment would immunize all defendants in this lawsuit, including the governor, and therefore all of the foregoing considerations that favor granting a stay in proceedings pending resolution of the appeal apply with equal force to the claims against the governor. Like the attorney general defendants, the governor will have irretrievably lost much of the benefit of his eleventh amendment immunity should this litigation be permitted to proceed beyond its current stage to discovery and trial, only to have the Eleventh Circuit eventually reverse this court's ruling on the immunity issue.

D.

In granting the attorney general defendants' motion and entering a stay of all proceedings in this case pending appeal, the court makes two additional observations. First, the court notes that the plaintiffs have stated that they would suffer no significant harm from a delay in the proceedings before this court pending appeal, provided that the court would lift the stay to entertain any request brought by the plaintiffs for preliminary injunctive relief should any emergency matters arise. The court will indeed entertain any colorable request for such relief during the pendency of the stay, in recognition of the fact that in the abortion context, given the unique circumstances presented by a woman's pregnancy, time frequently is of the essence, because decisions must often be made quickly for purposes of preserving maternal health and physicians cannot await the judicial resolution of difficult legal issues.

Second, the court notes that both the attorney general defendants and the governor have indicated that they would not oppose any request made by the plaintiffs that the Eleventh Circuit conduct an expedited review of the attorney general defendants' appeal. It bears emphasis that such an expedited appeal would of course minimize any potential harm to any party due to a delay in the proceedings before this court.

III. CONCLUSION

For the foregoing reasons, it is ORDERED that the motion to stay proceedings pending appeal, filed by defendants Bill Pryor and Ellen Brooks on February 13, 1998, is granted, and further proceedings in this cause are stayed until the appeal taken by defendants Pryor and Brooks is resolved on the merits. Of course, this stay will not extend to any extraordinary request by the plaintiffs for a temporary restraining order, a preliminary injunction, or similar relief, the thrust of which is, among other things, to maintain the status quo or preserve the court's jurisdiction.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-6129

SUMMIT MEDICAL ASSOCIATES, P.C., on behalf of themselves and their patients' seeking abortions; WILLIAM H. KNORR, M.D., on behalf of himself and his patients seeking abortions; NEW WOMAN, ALL WOMEN HEALTH CARE, on behalf of themselves and their patients seeking abortions,

Plaintiffs-Appellees,

versus

FOB JAMES, in his official capacity as Governor for the State of Alabama and his agents and successors,

Defendant,

BILL PRYOR, in his official capacity as Attorney General for the Stateof Alabama and his agents and successors; ELLEN BROOKS, in her official capacity as Montgomery District Attorney and as representative of the class of district attorneys for the State of Alabama,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____

F.2d _____).

[Filed Sep. 22, 1999]

Before: EDMONDSON, COX, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX E

Judicial Power, U.S. Const., art. III, § 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX F

28 U.S.C. § 1291. Final Decisions of District Courts.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(Added June 25, 1948, ch. 646, 62 Stat. 929; amended Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e); 72 Stat. 348; April 2, 1982, Pub. L. 97-164, § 124, 96 Stat. 36.)

(2)

Supreme Court, U.S.
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No. 99-1041

IN THE

Supreme Court of the United States

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney,

Petitioners,

—v.—

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients seeking abortions,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court below properly refused to engage in plenary review of all jurisdictional issues in an Eleventh Amendment collateral order appeal?

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Respondents Summit Medical Associates, P.C., Beacon Women's Center, New Woman, All Women Health Care, and William H. Knorr, M.D., respectfully submit the following brief in opposition to the petition for a writ of certiorari filed by Alabama Attorney General Bill Pryor and Montgomery County District Attorney Brooks [collectively "the Attorney General"].

COUNTERSTATEMENT OF THE CASE

This case was filed on July 25, 1997, as a pre-enforcement challenge to two Alabama abortion statutes. One statute bans "partial-birth abortion," a term defined so broadly by that statute that numerous courts have held that similar statutes could prohibit most first and second trimester abortions. *See, e.g., Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478, 493-94 (D.N.J. 1998), *appeal docketed*, No.99-5042 (3d Cir. argued Nov. 19, 1999). The second statute restricts post-viability abortions and imposes viability testing requirements beginning at nineteen weeks of pregnancy. The complaint alleges that these statutes violate the right to privacy, the pregnant woman's right to life, and that the statutes are void for vagueness. Complaint at 21-23 ¶¶ 64, 66, 68, 70, 76, 78.

In response to the filing of the lawsuit, Attorney General Pryor by letter directed four Alabama district attorneys to limit their prosecutions under the partial-birth abortion ban statute to post-viability abortions. Nevertheless, as Mr. Pryor has elsewhere made clear to this Court, the partial-birth abortion ban is not limited to post-viability abortions. *See* Brief of Amici Curiae Alabama, et al., *Stenberg v. Carhart*, No. 99-830, at 9 n.8 ("The partial-birth abortion statutes . . . are not limited to viable children [sic]."). Mr. Pryor gave no instruction to any Alabama district attorney regarding enforcement of the post-viability statute.

Although none of the plaintiffs alleged in the Complaint that they performed post-viability abortions, some plaintiffs alleged that they perform abortions after the point at which the post-viability statute requires viability testing; and counsel for the Attorney General agreed that he might view certain abortions performed by plaintiffs as post-viability abortions. *See* Transcript of Argument on Motion to Dismiss at 28-29. All the plaintiffs alleged that they performed abortions that could be prohibited by the partial-birth abortion ban statute. *See* Complaint at 4 ¶ 13.

The Attorney General filed an omnibus motion to dismiss, on the grounds, *inter alia*, that the suit (which sought only prospective injunctive and declaratory relief) was barred by the Eleventh Amendment, and that plaintiffs lacked standing to sue. The district court, in a carefully considered opinion, rejected both of these claims. 44a-54a, 55a-64a.[1]

The Attorney General appealed the district court's rejection of its claim of Eleventh Amendment immunity. The district court, finding the appeal non-frivolous, stayed further proceedings pending the outcome of the interlocutory appeal. 155a. The Attorney General also asked the court of appeals to find that plaintiffs lacked standing to sue and that, consequently, the case should be dismissed on Article III jurisdictional grounds. The court of appeals affirmed the district court's judgment that the Attorney General was not immune from suit under the Eleventh Amendment as to the criminal liability portions of the partial-birth abortion statute and as to the post-viability statute, but reversed the district court's judgment as to the civil liability portion of the partial-birth statute, finding that the Attorney General was immune because he had no tangible role in enforcement of this portion of the statute. 27a. The court of appeals further held that plaintiffs' standing was not "inextricably intertwined"

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[1] Citations to the Appendix to the Petition are given in the form "__a."

with the Attorney General's Eleventh Amendment immunity defense, nor was consideration of plaintiffs' standing "necessary to ensure meaningful review" of the Eleventh Amendment issue. 15a. Accordingly, after rejecting the Attorney General's Eleventh Amendment immunity claim, the court below declined to address the question of plaintiffs' standing, writing that it "may be litigated on appeal from any final judgment." 28a.

On the Attorney General's petition for rehearing and rehearing en banc, no judge in active service requested a poll; the petition was thus denied. 157a. The court of appeals also denied the Attorney General's motion for a stay of its mandate pending the Attorney General's petition for certiorari. Because the Attorney General did not raise the Eleventh Amendment immunity issue in its Petition to this Court, the district court's rejection of the Attorney General's Eleventh Amendment claim is now *res judicata*.

REASONS FOR DENYING THE WRIT

The Petition seeks to expand radically the collateral order doctrine established by this Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), by permitting state officials who have appealed an issue that falls *within* that doctrine also to appeal *any other jurisdictional issue*, even if it would not, in its own right, fall within that doctrine. This effort runs directly counter to this Court's clear instruction:

> [W]e have also repeatedly stressed that the "narrow" [collateral order] exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated . . . .

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citations omitted). The petition should therefore be denied. *See also id.* at 869 n.3 (court of appeals lacks subject matter jurisdiction over interlocutory appeal that does not meet the *Cohen* requirements).

Moreover, the Petition fails to demonstrate any direct conflict with this Court's decisions, instead pointing out only a "conflict" with certain general jurisdictional principles, never held applicable to collateral order appeals, and none of which the decision of the court below threatens. The Petition likewise fails to establish a direct conflict between the decision below and the decision of another court of appeals. Instead, the Petition tries to piece together such a conflict out of *dicta* from one court of appeals decision, a concurring opinion from another court of appeals, and a second decision from the court below.

I. THE DECISION BELOW IS IN HARMONY WITH THIS COURT'S DECISIONS NARROWLY CIRCUMSCRIBING COLLATERAL ORDER APPEALS.

By statute, the jurisdiction of United States courts of appeals extends only to "final decisions" of district courts, 28 U.S.C. § 1291, and certain specifically enumerated interlocutory orders. *See* 28 U.S.C. § 1292. This Court has, however, under the rubric of the "collateral order" doctrine, construed the term "final decision" to include "a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.'" *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). This small category includes appeals from interlocutory orders denying motions to dismiss on Eleventh Amendment grounds, such as that decided by the court below. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

The category of immediately appealable interlocutory orders does not include, and has never been held to include, appeals from motions to dismiss on grounds of lack of standing, ripeness or mootness, or on grounds of lack of subject matter jurisdiction generally. *See Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 497 n.2 (7th Cir. 1993) (standing); *Crymes v. DeKalb County*, 923 F.2d 1482, 1484 (11th Cir. 1991) (ripeness); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974) (standing). Put differently, although litigants have a right to have these issues decided before the merits of a case are decided -- a right exercised and honored by the district court below -- they do not have the right to have these issues decided by a court of appeals before a final judgment has been reached by the trial court.

In *Swint,* this Court declined to "definitively or preemptively settle . . . whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves appealable." 514 U.S. at 50-51. Instead, *Swint* suggests that such conjunctive review of an otherwise unappealable ruling should only be considered when it is "inextricably intertwined" with, or "necessary to ensure meaningful review of," the appeal over which the court of appeals has jurisdiction. 514 U.S. at 51.

The Attorney General does not here contend that the standing of the plaintiffs meets either of these criteria, or that a ruling on plaintiffs' standing to sue itself comes within the collateral order doctrine. Instead, the Attorney General simply argues that the approach adopted by the court below conflicts with the principle that a federal court has an independent obligation to address its Article III jurisdiction. This purported "conflict," however, misconceives both the collateral order doctrine and the nature of a federal court's "obligation" to examine its own Article III jurisdiction.

First, the collateral order doctrine, as *Swint* makes clear, should not be abused by courts of appeals as a vehicle by which to engage in interlocutory review of "further rulings of a kind neither independently appealable nor certified by the district court," 514 U.S. at 47, because such abuse would depart "from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* The approach of the court below is fully consistent with this important principle in *Swint*.

Second, "the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). In other words, the appellate court called upon to decide a collateral order appeal must first determine whether the issue presented falls within that doctrine; if it does not, it *lacks jurisdiction* to decide the appeal. Thus, the base-line jurisdictional obligation of the court of appeals in a collateral order appeal is *not* to assess whether the plaintiffs have standing to sue on the merits, as urged by the Attorney General.[2] Instead, the court of appeals must examine whether the district court ruling it is being asked to review is "conclusive, . . . resolve[s] important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citing *Cohen*, 337 U.S. at 546). In this exercise of "jurisdiction to determine jurisdiction," once the court finds that the issue raised does not fall within the collateral order doctrine, "the inquiry is

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[2] In contrast, an inquiry into a plaintiff's standing to sue is, of course, common in interlocutory appeals specifically authorized by Congress under 28 U.S.C. § 1292. Thus, inquiry into the plaintiffs' standing is perfectly appropriate in an appeal from the grant of a preliminary injunction, such as occurred in *Ashmus v. Calderon*, 522 U.S. 740 (1998), cited by the Petition. But *Ashmus* does not establish that such an inquiry is appropriate in collateral order appeals.

over"; thus, the court below properly left the Attorney General to appeal the standing issue after a final judgment.[3]

The Attorney General, in fact, points to no decision of this Court involving the collateral order doctrine that authorizes wide-ranging Article III jurisdictional inquiries on issues that do not themselves satisfy *Cohen*. The Attorney General, instead, confuses the question of *the jurisdiction of the court of appeals to decide the Eleventh Amendment jurisdictional issue* presented below with the issue of *the jurisdiction of the court of appeals to review the district court's Article III jurisdiction*. The court of appeals had jurisdiction over the Eleventh Amendment issue under *Cohen*. It did not, however, have jurisdiction over the issue of plaintiffs' standing to sue -- jurisdiction over that issue remains with the district court until final judgment, as do numerous other issues that do not meet the criteria set forth in *Cohen*. Thus, the purported "conflict" is really only a misunderstanding by the Attorney General of when and where he may raise Article III jurisdictional arguments.

In the final analysis, then, the Attorney General is simply asking this Court to allow it to "parlay" its collateral order appeal into a "multi-issue interlocutory appeal ticket[]." *Swint*, 514 U.S. at 50. Because this Court has repeatedly warned against this maneuver, the petition should be denied.

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[3] Of course, the State has the option of seeking certification from the district court. *See Swint*, 514 U.S. at 46 (discussing 28 U.S.C. § 1292(b)); *see also id.* at 50 (discussing holding of *United States v. Stanley*, 483 U.S. 669, 676-77 (1987), that immediate appellate review under § 1292(b) was limited to the order certified by the district court).

II. THE ATTORNEY GENERAL HAS FAILED TO PRESENT A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF ANY OTHER UNITED STATES COURT OF APPEALS.

The Attorney General points to three decisions which it claims conflict with the decision below. One is simply another decision of the court below, *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (11th Cir. 1999); but an intracircuit conflict does not, in itself, merit review by this Court. *See* Sup. Ct. R. 10. A second is a concurring opinion by one judge on a three-judge panel, *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996); this, too, does not amount to a conflict with the decision of another court of appeals.

The third purported conflict is with a decision of the United States Court of Appeals for the Fifth Circuit, which addressed the standing of the plaintiffs in that case, and found that the plaintiffs did indeed have standing before proceeding to find that the defendants were immune from suit. *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 n.12 (5th Cir. 1999). But this is a conflict only with dicta, not a holding of the court. The result in *Texas Tech* would have been the same even if the court had remained silent on the issue of the plaintiffs' standing (as did the court below), for *Texas Tech* winds up finding that the government appellants there were immune from suit. Thus, the conflict is, in reality, an illusory one.[4]

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[4] A true conflict would be presented if one court of appeals, in a collateral order appeal on Eleventh Amendment immunity, ordered dismissal based on the plaintiff's lack of standing under the belief that it had an independent obligation to assess the plaintiff's standing even if the plaintiff's standing was not "inextricably intertwined" with the Eleventh Amendment issue. The Attorney General has pointed to no such case.

Because the Attorney General has failed to identify a direct conflict with any other decision from another court of appeals, the Petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 2, 2000. Respectfully submitted,

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EDITOR'S NOTE

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No. 99-1041

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and **ELLEN BROOKS**, in her official capacity as Montgomery District Attorney;

Petitioners,

v.

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and **WILLIAM H. KNORR, M.D.,** on behalf of themselves and their patients' seeking abortions;

Respondents.

On Petition for Writ of Certiorari to the
United State Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37(2)(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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February 2, 2000

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QUESTION PRESENTED

I

Whether the Judgment for the Respondents must be reversed for lack of **Article 3, §2** Subject Matter Jurisdiction due to failure of the Trial Court to make the Jurisdictional Findings of Fact required by the ***Younger*** **Abstention Doctrine**, ***Younger v. Harris***, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and the ***Huffman*** **Abstention Doctrine**, ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975) ?

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Article 3, §2, ... **7-9, 15**
1ST Amendment, ... **19**
10TH Amendment, ... **9, 11-12**
11TH Amendment, ... **2-9, 11-12, 14-17, 19-20**
14TH Amendment, (Due Process Clause), ... **9**

United State Supreme Court Rule 37(2)(b), ... **1**

STATE RULES, STATUTES

Bettendorf Zoning Code
§24.2, ... 4
§24.4 (**20% Rule** [procedural] **"Protest"**), ... **4, 7**

Iowa Constitution,
Article 1, §9 and §18 (**"Vested Rights"** claim), . . . **5**

Ohio Revised Codes, Chapter 3767 (re ***Huffman***), ... **12**

TEXTS, LAW REVIEWS, MISCELLANEOUS

Criminal Law, ***Rollin M. Perkins***,
Foundation Law Press, 3RD Ed. (First published in 1955)
at, pages 465-466,, ... **12-13**

Supreme Court Practice, *7TH Ed.*, ***Stern, Gressman, Shapiro and Geller*, ©1993,** at page 495, ... **8**

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37(2)(b) IN SUPPORT OF NEITHER PARTY, SUGGESTING A SUMMARY REVERSAL OF THE JUDGMENT FOR THE RESPONDENTS UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 83 (1998) FOR LACK OF SUBJECT MATTER JURISDICTION DUE TO FAILURE OF THE TRIAL COURT TO MAKE THE JURISDICTIONAL FINDINGS OF FACT REQUIRED BY *YOUNGER V. HARRIS*, 401 U.S. 37 (1971), AND *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975).

NOW COMES James J. Clancy, Attorney at Law, and a member of the Supreme Court Bar, to move this Court for leave to file a Brief Amicus Curiae, in support of neither of the Parties, suggesting a summary reversal of the Judgment for Respondents under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (March 4, 1998), upon the grounds of lack of subject matter jurisdiction, pursuant to the 11TH Amendment; *Watson v. Buck*, 313 U.S. 387 (1941); *Younger v. Harris*, 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); and the *Younger* - *Huffman* **Abstention Doctrines** for failure of the Trial Court to make the jurisdictional findings of fact required by *Younger* and *Huffman*, see, in particular, *Huffman*, 420 U.S. at 611-613 (last three [3] paragraphs of Chief Justice Rehnquist's opinion).

Petitioner Pryor has not responded to the request for a written consent to the filing. Respondents do not consent. See correspondence at **Appendix A** to this Brief Amicus Curiae. [1]

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[1] No counsel for a party authorized this Brief in whole or in part, and no person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation or submission of this Brief.

As noted by the Trial Court below, the **11TH Amendment** issue presents a case of first impression in the partial birth abortion area. See ***Summit Medical Associates, P.C., et al. v. Fob James, Jr., et al.***, 984 F.Supp. 1404 at 1420 (Jan. 26, 1998).

In the Trial Court below, Attorney General Pryor pleaded the **11TH Amendment** and the ***Younger*** **Abstention Doctrine** as a jurisdictional bar which precluded the Federal Court from asserting subject matter jurisdiction over the Plaintiff's Complaint as filed. This Motion of Amicus Curiae James J. Clancy is made necessary because the issue of Federal power (i.e., subject matter jurisdiction under the **11TH Amendment**), which was the paramount issue raised by the Alabama Attorney General in the Court below, is not discussed in the Attorney General's Petition for Writ of Certiorari.

BRIEF OF AMICUS CURIAE JAMES J. CLANCY IN SUPPORT OF NEITHER PARTY.

I INTEREST OF AMICUS CURIAE: BACKGROUND.

Amicus learned of the Alabama Attorney General's **11TH Amendment** challenge to Federal jurisdiction and the 11TH Circuit's Opinion in ***Summit Medical Associates, P.C.; et al. v. Pryor, et al.*** No. 98-6129 (July 15, 1999) from a subscription copy of **68 U.S.L.W. at 1079**, dated August 10, 1999 and requested his computer operator to obtain a copy from the Internet.

On August 18, 1999, Amicus received a copy of the opinion from the (BNA) Internet and made four phone calls to the Attorney General's Office in Montgomery, Alabama (334-242-7300). Upon inquiry, he was informed that Bert Jordan in Birmingham was one of the attorneys for Attorney General Pryor on appeal.

On September 2, 3, 10, 11 and 14, 1999, Amicus phoned Bert Jordan (205-870-0555). On September 14TH Amicus had a lengthy (44 minute) phone conversation with Jordan in which the importance of the Alabama Attorney General's 11TH Amendment challenge as a case of first impression was discussed at great length. Jordan informed Amicus that he was one of the attorneys on the case, and that a petition for rehearing en banc would be filed.

On October 18, 1999, Amicus had a second lengthy (43 minute) phone conversation with Jordan and was informed that a petition for certiorari would be filed on or about November 10, 1999 and that the matter of filing a petition for certiorari was being discussed, but it was not known who would prepare the petition.

During the above two lengthy phone conversations with Jordan, Amicus expressed his interest in the Alabama Attorney General's Petition for Certiorari and his convictions: (1) that the ***Summit*** case should be reversed upon the authority of ***Younger v. Harris***, supra, and ***Huffman v. Pursue, Ltd.***, supra, because they were squarely in point on the **11TH Amendment** issue and were controlling; and (2) that Amicus had been attempting to raise that issue in the U.S. Supreme Court since 1975 (25 years); and was presently trying to do so in a case known as ***In Re Clarence Murphy***, No. 98-1442, etc.; and also explained most of the contentions of Amicus regarding his reason why the ***Younger*** and ***Huffman*** **Abstention Doctrines** were controlling.

On Saturday, January 15, 2000, Amicus learned from an ***L.A. Times*** news article that this Court had granted a Writ of Certiorari in ***Stenberg v. Carhart***, No. 99-830. On Monday, January 24, 2000, Amicus was informed by the Alabama Attorney General in Montgomery (334-242-7445 [Michael Jackson]) that Attorney Jay Sekulow in Washington, D.C. was preparing the Petition for the Alabama Attorney General. On

January 27, 2000, Amicus received a fax copy of the Petition from Attorney Sekulow and learned for the first time that neither the **11TH Amendment** issue nor the ***Younger* Abstention Doctrine** issue was raised in the Petition for Writ of Certiorari even though the **11TH Amendment** issue was the principal issue urged by the Attorney General in the Trial Court. On January 28, 2000, Amicus faxed a request for consent to filing an Amicus Curiae Brief for the benefit of the Court on the **11TH Amendment** and the ***Younger* - *Huffman* Abstention** issues. See **Appendix A** to the Amicus Curiae Brief.

II. INTEREST OF THE AMICUS CURIAE: STATEMENT OF THE CASE OF CLIENT CLARENCE F. MURPHY, IN THE U.S. SUPREME COURT IN CASE NO. 98-1442.

Planned Parenthood wishes to construct an abortion clinic in Bettendorf, Iowa. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 Zone.

Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose a property in a PUD Zone within 200 feet of three relatively new residential apartment complexes and submitted an application for approval of a C-5 Zoning Ordinance.

Murphy and two other adjacent apartment owners within 200 feet of the Planned Parenthood property made a successful statutory protest (**20% Rule**) against the zone change, pursuant to **Bettendorf Zoning Code, §24.2 and §24.4** (see at **Appendix B** to this Amicus Brief, Murphy's Iowa District Court Petition for a Declaratory Judgment filed on December 7, 1999 as a foil to compensate for U.S. District Judge Wolle's refusal to allow Murphy to litigate Judge Wolle's egregious rulings in the Federal Court), which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the

City Council voted 6-1 in favor of the Zoning Ordinance. The City Council aligned itself with the protesters and on March 19, 1996 voted 5-1 to reject the C-5 Zoning Ordinance. That quasi-judicial order was not appealed and is now final and ***Res Judicata*** under Iowa Law.

Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The 8TH Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983).

Under Iowa case law, a city council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If an appeal is not filed within 30 days, the city council's actions become final, in which case, under the **11TH Amendment** and ***Huffman v. Pursue Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman***, and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8TH 1995]), the city council's quasi-judicial order is both final and ***Res Judicata***.

On March 21, 1997, one year and two days after the City Council's rejection of the C-5 Zoning Ordinance, Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court, pleading what is, in essence, an appeal from the March 19, 1996 decision of the Bettendorf City Council which considered essentially the same issues and facts and denied the application for the C-5 Zoning Ordinance in a quasi-judicial order which was not appealed to the Iowa District Court. The federal complaint: **(1)** did not name the three adjacent apartment owners who made the successful statutory protest as defendants; and **(2)** demanded attorney's fees under **42 U.S.C. §1988**.

The City of Bettendorf filed a Summary Judgment Motion, pursuant to the ***Huffman*** **Abstention Doctrine** and the ***Res Judicata*** **Doctrine** which Judge Wolle egregiously denied.

Upon conclusion of the federal trial, Judge Wolle entered a judgment which purported to rezone the property from P.U.D. to C-5 Zoning and awarded very substantial attorney's fees to Planned Parenthood under **42 U.S.C. §1988** which would not have been available had an appeal been taken to the Iowa District Court following the denial of the C-5 Zoning Ordinance.

Murphy moved to intervene in the U.S. District Court immediately after the City of Bettendorf (***"parens patriae"***) announced its decision not to appeal, for the purpose of appealing U.S. District Judge Wolle's Judgement on **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and other jurisdictional grounds, including Judge Wolle's denial of the City's Summary Judgment Motion on its plea of ***Res Judicata***.

Judge Wolle: **(1)** ruled "cursorily" on Murphy's "extensive" pleadings that the Intervention Motion was "untimely"; **(2)** refused to address the merits of Murphy's right to mandatory intervention; and the **11TH Amendment**; ***Res Judicata***, and other Jurisdictional claims raised at the time of Murphy's Intervention Motion, and **(3)** refused to hear oral argument on the intervention and jurisdictional claims.

In the Court of Appeals below, Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two forms: by the filing of a direct appeal and the filing of an original action (a verified complaint pursuant to a Petition for Writ of Mandamus) in the 8TH Circuit Court of Appeals, pursuant to 28 U.S.C. §1651(a).

In a highly unorthodox ruling, the Court treated the

Appellant's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus, as though they had been consolidated and, in a brief single order, denied the petition for Writ of Mandamus without an opinion, and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals also denied a petition for rehearing and suggestion of a hearing en banc in each of the two cases.

Murphy contended in his Petition for Writ of Mandamus, pursuant to the U.S. Supreme Court's original jurisdiction: **(1)** that Planned Parenthood has not stated, and cannot state a **42 U.S.C. §1983** cause of action because it had an adequate remedy under Iowa procedure of judicial review by the Iowa District Court (see ***Allen v. McCurry***, 449 U.S. 90 at 100 [1980] and ***Parratt v. Taylor***, 451 U.S. 527 [1981]), and **(2)** that it is not entitled to attorney's fees under **42 U.S.C. §1988** because Iowa and other state courts do not customarily award attorney's fees in litigation involving an appeal from a denial of a C-5 zoning ordinance and application of the **Bettendorf "Protest" Ordinance**; and **(3)** where, as here, a separate **42 U.S.C. §1983** cause of action is pleaded and relied upon, it must be tried in the Iowa District Court because of the **11TH Amendment** bar, which has been pleaded; and **(4)** in any event, Judge Wolle's Judgment must be reversed because, at this state of the proceedings, the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control the disposition of this case and mandate that the Federal Judgment must be vacated for lack of **Article 3, §2** subject matter jurisdiction.

Murphy contended he is entitled to a **Rule *Nisi*** pursuant to **28 U.S.C. §1651(a)** correcting the egregious refusal of both Courts to address the issue of "lack of **Article 3, §2** subject matter jurisdiction" under his **11TH Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83 (March 4, 1998) (duty to address the question of subject matter jurisdiction as the first order of business, and on its own motion,

if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S. 139 (1993) (creating a new Rule of Court re the issue "lack of subject matter jurisdiction"); ***Wisconsin Dept. of Corrections v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. Dist. Ct.***, 426 U.S. 394 (1976); ***Will v. U.S.***, 389 U.S. 90 (1967); and **Supreme Court Practice**, *7TH Ed., Stern, Gressman, Shapiro, Geller*, **©1993** at page 495.

II (A) Adequate Relief Cannot Be Obtained by Murphy in Any Other Forum or from Any Other Court for the Following Reasons:

"Adequate Relief" in the above context means "giving notice to the U.S. District Courts and the U.S. Courts of Appeals in the 11 Circuits, that the ***Huffman*** **Abstention Doctrine is "Jurisdictional" and that the Planned Parenthood Civil Rights Action must be dismissed on those grounds where the *Huffman* test has not and cannot be met. This requires a reexamination of this Court's opinion and decision in *Huffman v. Pursue, Ltd.***, supra.

II (B) The Refusal of a Majority of Federal Courts to Acknowledge the "Jurisdictional" Aspect of the *Huffman* Abstention Doctrine Manifests a Need for Re-Examination of the *Huffman* Cases.

Murphy contends that the rule of law re lack of **Article 3, §2 subject matter jurisdiction under this Court's opinion in *Huffman v. Pursue, Ltd.*, supra, has existed for the past 24 years as an 11TH Amendment right; yet few of the federal courts consider themselves bound thereby. See in this regard, U.S. District Judge Myron H. Thompson's analysis at pages 17-18, infra.**

When faced with Murphy's lawful right to intervene as an indispensable party and to contest the U.S. District Court's actions (requiring the construction of an abortion clinic within 200 feet of his apartment complex) pursuant to Murphy's claim of lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine**, the ***Rooker-Feldman*** **Abstention Doctrine**, (***Rooker v. Fidelity Trust Co.***, 263 U.S. 413 [1923] and ***Dist. of Columbia Court of Appeals v. Feldman***, 460 U.S. 462 [1983]), the ***Res Judicata*** **Doctrine** and the ***Stare Decisis*** **Doctrine**, both the U.S. District Court and the U.S. Court of Appeals for the 8TH Circuit dismissed such claims without an explanatory judicial opinion, in utter disregard of this Court's repeated admonitions that a federal court must rule on the jurisdictional issue as its first order of business.

Murphy submits that, in the light of what is said hereafter about the background of the rule of law expressed in ***Huffman v. Pursue, Ltd.***, supra, and the great harm which has resulted from this Court's having refused to "squarely" address the **11TH Amendment** jurisdictional aspect of the ***Huffman*** case, this Court should clarify the rule of law on "lack of **Article 3, §2** subject matter jurisdiction" in ***Huffman***.

III INTEREST OF THE AMICUS CURIAE: A RE-EXAMINATION OF *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975).

27 years ago (May 1973), the substantial federal question which controls this case; namely, the conflict between the subject matter jurisdiction of federal courts under the **14TH Amendment (42 U.S.C. §1983)** and **Article 3, §2** of the **U.S. Constitution**; and the subject matter jurisdiction of state courts under the **10TH** and **11TH Amendments** to the **U.S. Constitution**, was squarely before this Court in two forms: **(1)** in ***Lawrence S. Huffman v. U.S. District Court for the Northern District of Ohio, Western Division***, No. 72-1613

Misc., being a Motion for Leave to file a Petition for Writ of Mandamus and Petition for a Writ of Mandamus as to this Court's original jurisdiction pursuant to **28 U.S.C. 1651(a)**; and **(2)** in ***Lawrence S. Huffman v. Pursue, Ltd.***, No. 73-296. which is now reported as 420 U.S. 592, supra, being an appeal from an adverse judgment of a three judge court with respect to the constitutionality of the Ohio Public Nuisance Statute as then required by this Court's mandatory appellate jurisdiction under **28 U.S.C. §2281** (repealed in 1976).

Amicus Curiae James J. Clancy [2/] was Counsel of Record for Allen County, Ohio Prosecutor Huffman (hereinafter "Huffman") in Huffman's two cases in 1975. A duplicate copy of the Jurisdictional Statement and the Petition for Rehearing in ***Huffman v. Pursue, Ltd.***, No. 73-296 and the Motion for Leave to File a Petition for Writ of Mandamus and Petition for Writ of Mandamus in ***Huffman v. U.S. District Court***, No. 72-1613 Misc. was filed with this Court as "Exhibits 1A. 1B and 1C" to the Petition for Writ of Mandamus in ***In Re Murphy***, No. 98-1442, with a request that this Court take Judicial Notice of such pleadings.

III (A) The Critical Status of the Ohio State Court's Jurisdiction and Huffman's Dilemma.

The final judgment which closed the Cinema I Theater as a Moral Public Nuisance in the Ohio public nuisance case was filed on November 30, 1972. The attorneys for the theater transferred the ownership to a newly formed Corporation and on the next day filed a civil rights action in the U.S. District Court attacking the constitutionality of the Ohio Public Nuisance Statutes (which required review by a three judge federal court).

[2/] Amicus Curiae James J. Clancy was also counsel of Record for Clarence F. Murphy in his Petition for Writ of Mandamus in ***In Re Murphy***, U.S. Supreme Court No. 98-1442, October Term 1998.

On the date the action was filed, the Common Pleas Court in Lima Ohio still had statutory jurisdiction for 30 days for the purpose of considering post trial motions, the filing of a notice of appeal and motions for attorneys' fees, etc.

In the two *Huffman* cases which were before this Court, Huffman made a determined effort to focus the Court's attention on "Subject Matter Jurisdiction" which, according to this Court's prior precedents was and is always to be the first order of business (see *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 [March 4, 1998]) and properly belonged in the Ohio State Court System. This tactic was absolutely essential to the prosecutor's success, so that he could get a definitive appellate ruling on the "closure" procedure by the Ohio Supreme Court in this *Huffman* "test case" (which ruling would also be available as "precedent" in other State Public Nuisance Abatement cases which were then being developed using the civil abatement process, and the Time and Motion Study and Film Continuity Study as real evidence for the prosecution, and the potential of an award of attorney's fees to cover the cost of abatement and closure of the Ohio Moral Public Nuisance).

III (B) Abdication of this Court's Primary Duty re Jurisdiction in *Huffman*– Ohio's Concern re Moral Depravity, an Important State Interest under the 10TH and 11TH Amendments.

Unfortunately, this Court avoided answering the "subject matter jurisdiction" question which was squarely raised in the (original) Petition for Leave of Court to File a Petition for Writ of Mandamus after Solicitor General Robert Bork informed the Court that the "Jurisdictional Statement" on the mandatory appeal had been filed in the interim and that the "jurisdiction" question "could" (not "would") be addressed in that case when this Court heard that appeal pursuant to its mandatory appellate jurisdiction of the three Judge Court Judgment.

In 1973, the National need for a decision upholding the subject matter jurisdiction of a state court on important state matters such as the abatement of moral public nuisances pursuant to Chapter 3767 of the Ohio Revised Codes and the **10TH and 11TH Amendments** was abundantly clear. The "moral depravity" which then was being exhibited by the escalating pornography industry and porn industry films, such as the film "Deep Throat", (which "glorified" sodomy per o.s. [oral sodomy]) were appearing as the regular fare at the Cinema I Theater in Lima, Ohio and on motion picture screens in each of the 50 States. The federal courts were wrongfully being employed by the porno industry to interfere with the **10TH and 11TH Amendment efforts** of law enforcement to produce real evidence of such hard-core films in the state courtrooms using the search warrant process and the subpoena duces tecum process. See, for example, ***Hicks v. Miranda***, 422 U.S. 322 (1975) as an example of the intrusive litigation faced by law enforcement.

In May of 1973, the depravity that files like "Deep Throat" represented in its graphic depictions of "oral sodomy" (o.s.) was uniformly recognized as being contrary to the "Natural Law" and Judaeo Christian moral standards, and acknowledged as such by an overwhelming majority of the legal profession. 23 years earlier (1950), Professor Rollin M. Perkins, now Connell Professor of Law Emeritus, U.C.L.A. Professor Emeritus, University of Hastings College of Law had instructed Amicus Curiae herein (as a first year law student in Prof. Perkins' criminal law class at U.C.L.A.), and later published in his definitive text on the Criminal Law, that the Common Law in the United States with respect to this subject (oral sodomy) and "public morals" was clearly defined and well documented. [3]

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[3] See text of ***Perkins*** on Criminal Law (at pages 465-466), *the Foundation Law Press*, 3RD Ed., (first published in 1955), which reads in part:

" The ancient city of Sodom, reputedly destroyed because

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III (C) The Prosecuting Attorney's Interests Versus This Court's Interests in *Huffman*.

In both cases, Huffman asked that the U.S. District Court Order be vacated and that the case be remanded to the Ohio Judicial System (so that a final appellate decision could be achieved).

The "Questions Presented" at pages 5-9 and the "Statement of Facts" at pages 9-28 of the Petition in No. 72-1613 Misc. was purposely comprehensive[4/] and tailored to the Prosecutor's special needs so that anyone in the appellate chain who later undertook a study of those documents would immediately recognize the jurisdictional issue being raised and the need for an issuance of a **Rule *Nisi*** re jurisdiction.

This Court was thinking of the Federal Judiciary's own National needs, and was not (primarily) interested in the practical aspects of the Public Nuisance Abatement case in relation to the State of Ohio.

At Oral Argument, Justice Stewart asked if Ohio would be satisfied if the ***Younger*** **Rule** in criminal cases were extended to civil proceedings. Prosecutor Huffman answered "No", in that, under this Court's own precedents, it must first address the question of "subject matter jurisdiction"– i.e., whether the case

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> of its unspeakable vices, is the source from which the word 'sodomy' is derived. The offense was regarded with such abhorrence in the early days that Blackstone literally refused to name it, referring to it only as 'the infamous *crime against nature*.'[25] 4 Bl.Comm. *215. " (Our Emphasis.)

[4/] See, in particular, at "Appendix C", pages C-7 through C-10, the pleading by reference of the time/motion studies of the films named, at paragraph 7(j) and 10(c) of the Complaint to abate the Cinema I Theater as a public nuisance.

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was properly before the Court– realizing that the State of Ohio had a very real need for its presence in the State of Ohio and an Ohio Appellate Ruling by the Ohio Supreme Court, and the U.S. District Court had interfered with the **11TH Amendment** subject matter jurisdiction of the State of Ohio Judicial System, as to an important State Interest.

Amicus Curiae Clancy recalls that, during oral argument, with knowledge of what was happening in "society" (in the "real world", the State Courts were being ham-strung by "technical" procedural decisions in their attempts to introduce the "prints" of hard-core pornographic films like "Deep Throat" in evidence before the State Courts on the merits) he stated, as his opinion, that the federal courts' ruling in the ***Huffman*** case was underwriting "cocksucking and whore mongering"– language never before used by Amicus Curiae in his professional career, or in conversation. Amicus Curiae had determined that he would make the statement if such a statement became necessary. It was necessary, but proved to be ineffective. A majority of the Court was determined to extend the ***Younger*** **Rule** to civil cases, and would say or do no more.

Unfortunately, the fractured nature of the Court in 1975 prevented the Justices from coming together on the **11TH Amendment** issue. Instead of remanding the case to the Ohio Judicial System for further proceedings, the majority of Justices complied with their duty by addressing the jurisdictional issue obliquely in a technical sense and formulated the **"*Huffman* Abstention Doctrine"** (as a proper response pursuant to the rudimentary rule of law that this Court had jurisdiction to determine jurisdiction). Proof of the correctness of this "jurisdictional" analysis can be found in the last paragraph of the Court's Opinion in ***Huffman v. Pursue, Ltd.***, supra, reading:

> " We therefore think that this case is appropriate for remand so that the District Court may consider

> whether irreparable injury can be shown in light of 'Without a Stitch,' and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. The judgment of the District Court is vacated and the cause is remanded for further proceedings consistent with this opinion." (My emphasis.)

The opinion failed to record the fact that the real issue before the High Court was "which of the two courts had subject matter jurisdiction" and that an **11TH Amendment** violation was at risk.

III (D) The Battle was Won, but the "War" was Lost. This Court Can, and must Correct That Defect.

That Huffman had prevailed on his appeal was no great victory. The "battle" was won, but the entire war against such obscene hard-core pornography was lost. Huffman acknowledged that reality by filing a Petition for Rehearing, which was summarily denied. The case was not remanded back to the Ohio Appellate Courts for their consideration, as requested by the State of Ohio in its Appeal, and the "closure" issue which was then before this Court was never resolved. ***Pursue, Ltd.***, the Plaintiff in the Federal District Court, refused to litigate further and disappeared. [5/]

Amicus Curiae respectfully submits that, in view of the above history, the ***Huffman*** **Abstention Doctrine** as it is presently being administered is wrong-headed. It was formulated as a jurisdictional rule to separate **Article 3, §2**

[5/] **See Appendix C to this Amicus Curiae Brief, being a contemporary historical account recently prepared by Amicus Curiae, writing of the disaster which resulted from the inability to obtain a resolution of the "closure" issue.**

jurisdiction from **11TH Amendment** jurisdiction, and should have been applied, as such, by the U.S. District Court. However, during the past 27 years this Court has never come together and admitted that background fact in any of the many opinions on the ***Younger*** - ***Huffman*** **Abstention** cases.

This Court can and should correct that defect in this case upon the facts set forth in this Amicus Curiae Brief by ordering U.S. District Judge Myron H. Thompson to vacate his judgment in the trial court for lack of subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and its progeny: ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423 (1982), ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75 (1984). ***University of Tennessee v. Elliott***, 478 U.S. 788 at 799 (1986), and ***Plough***, supra; and under the ***Rooker-Feldman*** **Abstention Doctrine**, the **Res Judicata Doctrine** and the **Stare Decisis Doctrine** of this Court.

ARGUMENT

In his opinion, U.S. District Judge Myron H. Thompson erroneously assumed that the ***Younger*** **Abstention Doctrine** was not applicable because a case involving the Statute was not pending in the State Court. See ***Summit Medical Associates***, 984 F.Supp. 1404 at 1432-1433. Amicus contends that Judge Thompson's assumption is fatal to his judgment for the Plaintiffs. See ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1 at 14-17 (1987) at fn. 9 on page 16:

> "9. In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficiently to justify abstention, even if there are no pending state proceedings in which the question could be raised. See ***Railroad Comm'n of Texas v. Pullman Co.***, 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643 (1941)." (My emphasis.)

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This is "such a case". The cause herein involves an "as applied" constitutional claim. The Trial Court's "referral of questions" to the Alabama Supreme Court and that Court's refusal to reply makes the Federal Court's Opinion "advisory" and satisfies the requirement of ***Pennzoil Co. v. Texaco, Inc.***, supra.

Plaintiffs cannot reinterpret ***Ex Parte Young***, supra, or use it to overrule ***Younger***, supra, because ***Ex Parte Young*** was "factored" into Justice Hugo Black's majority opinion in ***Younger***. The Federal District Court is bound by ***Younger*** and ***Huffman***, supra, and is required to make the special jurisdictional findings which ***Younger*** requires. See ***Huffman***, 420 U.S. at 611-613. That jurisdictional burden was on the Federal Plaintiff who had to plead and prove his right to be in the Federal Court.

The ***Younger*** **Abstention Doctrine** is controlling even where there is no state case pending at the time of filing the federal action where, as here, the State Court has not had an opportunity to interpret the State Statute, and such an interpretation can "save" the Statute– the so-called ***Watson v. Buck***, supra, exception which is referred to in Justice Black's opinion in ***Younger v. Harris***, 401 U.S. 37 at 45-46 and 49.

In his analysis, Judge Thompson did not consider the ***Younger - Huffman*** **Abstention Doctrines** as an integral part of the **11TH Amendment challenge**. See ***Summit Medical Associates***, supra, 984 F.Supp at 1419:

> "IV. ATTORNEY GENERAL DEFENDANTS' JURISDICTIONAL CHALLENGES
>
> " . . . .
>
> " For the sake of clarity, and to ensure that it fully and properly resolves each of the attorney general defendants' challenges, the court will address them

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> separately and systematically. First, it will determine whether, as the attorney general defendants contend, all of the plaintiffs' claims are barred by the eleventh amendment, so that the entire lawsuit must be dismissed. Next, the court will ascertain whether the suit as a whole, or any subset of the plaintiffs' claims, must be dismissed for lack of an Article III case or controversy. To resolve this issue, the court will address whether the plaintiffs enjoy standing to bring their various claims, as well as whether any of these claims has been rendered moot, and hence non-justiciable, in light of the defendants' post-filing actions. Finally, the court will determine whether any of the abstention doctrines, grounded on considerations of comity between the state and federal judicial systems, and on principles that govern federal [**19] courts sitting in equity, counsels dismissal of any of the plaintiffs' claims, or a stay pending resolution by the Alabama Supreme Court of any issues raised by these claims. . . . ." (My emphasis.)

The U.S. District Judge's analysis of the Alabama Attorney General's Jurisdictional challenges which appears thereafter at pages 1420-1439 reads:

> "A. **11TH Amendment**, 984 F.Supp. 1404 at 1420-1425.
>
> "B. **Article III Case** or Controversy requirements, 1425-1432.
>
> 1. Standing, 1425-1430.
> 2. Mootness, 1430-1432.
>
> "C. **Abstention Doctrines**, 1432-1439.
>
> 1. ***Younger*** **Abstention**, 1432-1434.
> 2. **Equity Principles**, 1434-1436.
> 3. **Pullman Abstention**, 1436-1439."

As can be seen from the above outline, the ***Younger*** **Abstention**

Doctrine, which should be analyzed at "Point A" on page 1420 (at the very beginning) because it and the ***Huffman*** **Abstention Doctrine** are squarely on point and controlling, appears, as an afterthought, as one of the General Abstention Doctrines to be considered as a mere matter of Equity.

CONTENTIONS OF AMICUS CURIAE JAMES J. CLANCY.

Younger v. Harris, supra (1971), was a 5-4 decision. The majority opinion, which was written by Justice Hugo Black, clearly rejected the type of interference which was employed by the Federal Court in this case. Although Justice Black was an absolutist on the **1ST Amendment**, he was a stronger supporter of "State's Rights" under the **11TH Amendment**, which is reflected in his ***Younger*** opinion, which involved a prosecution involving free speech. His "***Younger***" opinion (the ***Younger*** **Abstention Doctrine**) reconciled the principles expressed in 5 cases: ***Ex Parte Young***, 209 U.S. 123 (1908): ***Younger*** at 45; ***Dombrowski v. Pfister***, 380 U.S. 479 (1965): ***Younger*** at 48; ***Watson v. Buck***, 313 U.S. 387 (1941): ***Younger*** at 46, 49, 53; ***Fenner v. Boykin***, 271 U.S. 240 (1926): ***Younger*** at 45-46; ***Atlantic Coast Line R. Co. v. Engineers***, 398 U.S. 281 (1970): ***Younger*** at 40. The ***Younger*** **Abstention Doctrine** is firmly grounded upon the Sovereign right of each state under the **10TH and 11TH Amendment** to have its important state interests (both criminal and civil) tried and decided by the State Judiciary, which has the absolute right to "interpret" the statute and "assist" the State Legislature in its effort to write constitutional legislation, where possible, see ***Watson v. Buck***, supra.

Summit's race to the courtroom is fatal to its cause. By filing its Complaint in July, two weeks before the Statutes became effective (on August 1ST and 12TH, 1997), it is unable to establish that the U.S. District Court had federal subject matter jurisdiction because the statutes did not exist in July and were not effective. See, also, ***Hicks v. Miranda***, 422 U.S. 332

(1975) which would have been available to the Alabama Attorney General had he elected to use it (i.e., by filing a declaratory judgment action in the State Court alleging all of the issues raised by Summit and moving to dismiss the Federal action on the grounds that he was not acting as a "rogue" and, under the **11TH Amendment**, the first interpretive decision of the Statute must be by the Alabama Supreme Court after the first trial under the Statute except where the ***Younger*** special findings of fact exist).

CONCLUSION

In sum, the State of Alabama has the right of a sovereign state, under the **11TH Amendment**: **(1)** to enact a statute which criminalizes "Infanticide" and to outlaw the inhuman practice of partial birth abortion in the State of Alabama; **(2)** to have that "Infanticide" criminal statute and the partial birth abortion proscription interpreted by the Alabama Supreme Court and given a constitutional interpretation, if possible, under ***Watson v. Buck***, supra; **(3)** to rely upon the **Doctrine of Separation of Powers** which mandates that a state statute must be "saved", if possible, by the State Supreme Court, rather than struck by the federal courts (which cannot "interpret" a state statute); and **(4)** to answer any constitutional challenge in the State Court without being liable for attorney fees (compare **42 U.S.C. §1988**); where the ***Dombrowski***, supra, exception is not available because the statute is not unconstitutional in every sentence, clause, etc., nor is the Alabama Attorney General's conduct in the nature of that which is required for ***Dombrowski*** to be operational in the face of a ***Younger*** **Abstention Doctrine** challenge.

Dated: **February 2, 2000**

Respectfully submitted,

James J. Clancy, Amicus Curiae and Counsel of Record.

APPENDIX A

CORRESPONDENCE BETWEEN AMICUS CURIAE AND COUNSEL OF RECORD FOR PETITIONERS AND RESPONDENTS.

(Reference: ***Motion for Leave to File an Amicus Curiae Brief, etc.,*** **. Page 1, line 3, Page 4, line 10.)**

The Law Office Of James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

(818) 352-2069
FAX (818) 352-6549

January 28, 2000

Jay Alan Sekulow
Alabama Deputy Attorney General
1000 Thomas Jefferson St., N.W., Suite 609
Washington, D.C. 20007

Transmitted by Fax (letter only)
(202) 337-3167 and by
Federal Express

Re: ***Amicus Curiae*** Consent Request: ***Bill Pryor, in his official capacity as Attorney General for the State of Alabama, etc., et al. v. Summit Medical Associates, P.C.; et al.*** Petition for Writ of Certiorari in the U.S. Supreme Court, No. 99-1041.

Dear Mr. Sekulow;

Pursuant to **Rule 37(2)(a)** of the **U.S. Supreme Court Rules**, request is hereby made for your consent to the filing of a brief ***Amicus Curiae*** by my client, ***Clarence Murphy***, in support of neither party in the above cause.

Clarence Murphy contends that the ***Huffman*** - ***Younger*** **Abstention Doctrine** is controlling and that a Writ of Certiorari must be granted on the grounds that the Federal Court lacks subject matter jurisdiction under the **11TH Amendment** and the ***Huffman*** - ***Younger*** **Abstention Doctrine**.

The Question which has been proposed is as follows:

I

Whether the ***Huffman*** - ***Younger*** **Abstention Doctrine**, involving important state interests, expressed by this Court in ***Huffman v. Pursue Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969 and ***Younger v. Harris***, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and their progeny: ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982), ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) and ***University of Tennessee v. Elliott***, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986); and by the 8TH Circuit progeny: ***Plough v. West Des Moines Community School District***, 70 F.3d 512 (CA 8TH 1995); is based upon both **10TH** and **11TH Amendment** principles and is, therefore, "jurisdictional"; that is, whether its function is to resolve a conflict involving what appears to be "concurrent federal jurisdiction" by determining from the facts pleaded and before the trial, whether the federal court should have federal jurisdiction under **Article 3, §2** (and ***Ex Parte Young***, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 [1908]), or the state court should have exclusive jurisdiction under the **11TH Amendment** (i.e., the federal action must be dismissed) **?**

The arguments which ***Amicus Curiae Clarence Murphy*** will make in support of the above question are those set forth in the **Application for Leave of Court to File a Petition to**

Intervene Pursuant to F.R.C.P. 24(a)(2), and Petition for Writ of Mandamus, Pursuant to 28 U.S.C. §1651(a) in Excess of Applicable Page Limit (113 pages) in ***In Re Murphy***, U.S.S.C.T. Misc. No. A-612, transmitted to the U.S. Supreme Court on January 23, 1999 and filed with the U.S. Supreme Court on March 10, 1999 as ***In Re Clarence Murphy***, No. 98-1442 (30 pages).

A copy of the **Petition** in ***In Re Clarence Murphy***, No. 98-1442 (30 pages) and the oversized **Petition** submitted to the Court by Motion (and denied) is concurrently being transmitted to you by Federal Express on this date (Friday, January 28TH).

Sincerely yours;
James J. Clancy
Attorney for Clarence Murphy.

JJC/cjc

Encls.: ***In Re Clarence Murphy, Application, etc., and Petition to Intervene, etc.***, U.S.S.C.T. No. A-612 (sent by Federal Express).

In Re Clarence Murphy, Petition to Intervene, etc., U.S.S.C.T. No. 98-1442 (sent by Federal Express).

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January 28, 2000

Simon Heller, Esq. **Transmitted by Fax (letter only)**
Center for Reproductive Laws and Policy **(212) 514-5538**
120 Wall Street, 18TH Floor **and by Federal Express**
New York, New York 10005

Re: ***Amicus Curiae*** Consent Request: ***Bill Pryor, in his official capacity as Attorney General for the State of Alabama, etc., et al. v. Summit Medical Associates, P.C.; et al.*** Petition for Writ of Certiorari in the U.S. Supreme Court, No. 99-1041.

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Clarence Murphy contends that the ***Huffman*** - ***Younger*** **Abstention Doctrine** is controlling and that a Writ of Certiorari must be granted on the grounds that the Federal Court lacks subject matter jurisdiction under the **11TH Amendment** and the ***Huffman*** - ***Younger*** **Abstention Doctrine**.

The Question which has been proposed is as follows:

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Intervene Pursuant to F.R.C.P. 24(a)(2), and Petition for Writ of Mandamus, Pursuant to 28 U.S.C. §1651(a) in Excess of Applicable Page Limit (113 pages) in ***In Re Murphy***, U.S.S.C.T. Misc. No. A-612, transmitted to the U.S. Supreme Court on January 23, 1999 and filed with the U.S. Supreme Court on March 10, 1999 as ***In Re Clarence Murphy***, No. 98-1442 (30 pages).

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Sincerely yours;
James J. Clancy
Attorney for Clarence Murphy.

JJC/cjc

Encls.: ***In Re Clarence Murphy, Application, etc., and Petition to Intervene, etc.***, U.S.S.C.T. No. A-612 (sent by Federal Express).

In Re Clarence Murphy, Petition to Intervene, etc., U.S.S.C.T. No. 98-1442 (sent by Federal Express).

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January 31, 2000

Jay Alan Sekulow
Alabama Deputy Attorney General
1000 Thomas Jefferson St., N.W., Suite 609
Washington, D.C. 20007

Transmitted by Fax
(202) 337-3167

Re: Amendment to ***Amicus Curiae*** Consent Request fax letter, dated January 28, 2000, re: ***Bill Pryor, in his official capacity as Attorney General for the State of Alabama, etc., et al. v. Summit Medical Associates, P.C.; et al.*** Petition for Writ of Certiorari in the U.S. Supreme Court, No. 99-1041.

Dear Mr. Sekulow;

Please amend my Fax letter sent to you, dated January 28, 2000, to include a request that consent be given to Attorney James J. Clancy, as a member of the U.S. Supreme Court Bar, to file a Brief Amicus Curiae in this cause for the legal reasons set forth in the ***Petitions***, U.S. Supreme Court No. 98-1442, transmitted to your Office by Federal Express on Friday, January 28, 2000.

Sincerely yours;
James J. Clancy

JJC/cjc

The Law Office Of James J. Clancy
9055 La Tuna Canyon Road
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FAX (818) 352-6549

January 31, 2000

Simon Heller, Esq. **Transmitted by Fax**
Center for Reproductive Laws and Policy **(212) 514-5538**
120 Wall Street, 18TH Floor
New York, New York 10005

Re: Amendment to ***Amicus Curiae*** Consent Request fax letter, dated January 28, 2000, re: ***Bill Pryor, in his official capacity as Attorney General for the State of Alabama, etc., et al. v. Summit Medical Associates, P.C.; et al.*** Petition for Writ of Certiorari in the U.S. Supreme Court, No. 99-1041.

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Sincerely yours;
James J. Clancy

JJC/cjc

APPENDIX B

CLARENCE F. MURPHY V. PLANNED PARENTHOOD OF GREATER IOWA, INC., ET AL.,
SCOTT COUNTY DISTRICT COURT NO. 94716:

FIRST AMENDED PETITION FOR A DECLARATORY JUDGMENT AND AN INJUNCTION TO PREVENT PLANNED PARENTHOOD'S USE OF LAND FOR THE OBNOXIOUS AND OFFENSIVE TRADE OF ABORTION AND INFANTICIDE IN VIOLATION OF: (1) PETITIONER MURPHY'S SUCCESSFUL STATUTORY PROTEST PURSUANT TO BETTENDORF ZONING CODE §24.2 AND §24.4; AND (2) PARAGRAPH 3 OF THE RECIPROCAL RESTRICTIVE AND PROTECTIVE COVENANTS THAT RUN WITH BOTH PETITIONER MURPHY'S LOT 3 OF BLOCK 4 AND THE ADJOINING LAND OF PLANNED PARENTHOOD TO THE SOUTH, WHICH LIES BETWEEN BLOCK 4 AND BLOCK 1 AND WITHIN THE QUAD CITY TECHNOLOGICAL CENTER, A PLANNED UNIT DEVELOPMENT (P.U.D. ZONE).

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ... Page 4, line 27.)

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

	)	**Case No. 94716**
Clarence F. Murphy,	)	
Plaintiff,	)	**First Amended Petition for a**
	)	**Declaratory Judgment and**
vs.	)	**an Injunction to Prevent**
	)	**Planned Parenthood's Use of**
Planned Parenthood of	)	**Land for the Obnoxious and**
Greater Iowa, Inc.	)	**Offensive Trade of Abortion**
Defendant,	)	**and Infanticide in Violation**
	)	**Of: (1) Petitioner Murphy's**
and	)	**Successful Statutory Protest**
	)	**Pursuant to Bettendorf**
The City of Bettendorf,	)	**Zoning Code §24.2 and**
Iowa	)	**§24.4; and (2) Paragraph 3**
Defendant,	)	**of the Reciprocal Restrictive**
	)	**and Protective Covenants**
and	)	**That Run with Both**
	)	**Petitioner Murphy's Lot 3 of**
Middle Road Investors, Inc)		**Block 4 and the Adjoining**
Defendant.	)	**Land of Planned Parenthood**
	)	**to the South, Which Lies**
		Between Block 4 and Block 1
		and Within the Quad City
		Technological Center, a
		Planned Unit Development
		(P.U.D. Zone).

COMES NOW Plaintiff, Clarence F. Murphy, and for his Petition for a Declaratory Judgment and Injunction, states as follows:

PARTIES

1. Petitioner Clarence F. Murphy and his wife Hwa Cha Murphy (hereinafter called "Petitioner Murphy" and "Murphy") are citizens of Bettendorf, Iowa, who reside at 2835 Willow Drive, Bettendorf, Iowa. Murphy and his wife are the owners of two twelve plex apartments known as 2655 Tech Drive, Bettendorf (a.k.a. Lot 3. of Block 4) and 2750 Tech Drive, Bettendorf (a.k.a Lot 2 of Block 2) of the Quad City Technological Center, a planned unit development and hold title to such properties in the name of Murpak Enterprises, Inc., a Delaware Corporation which is wholly owned by Murphy and his wife Hwa Cha.. See **Exhibit** pages **C-3** and **C-4**, infra.

2. Lot 3 of Block 4 was conveyed by Middle Road Investors, Inc. (hereinafter called "Defendant Middle Road" and "Middle Road") to Petitioner Murphy by Warranty Deed dated January 30, 1976, which was filed with the Office of Scott County Recorder on February 18, 1976 as Document 2524-76 (after the Iowa Supreme Court decision in ***Kuntz*** [infra, 1975] and ***Harris***, [infra, 1975]). Defendant Middle Road had acquired its ownership by Warranty Deed from the City of Bettendorf (hereinafter called "Defendant Bettendorf" and "Bettendorf") on the same date (February 18, 1976) in partial performance of a contract dated November 7, 1972 and recorded in the Office of Scott County Recorder as Document 1947-73. The abstract for the Plat of Lot 3 of Block 4, which is attached as **Exhibit A** and incorporated by reference herein, contains the following certification at page **A-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973,

as Document #5134-73 with the platting of Block 1 of Quad City Technological Center shall remain in effect and apply to Lot 3 of Block 4 as platted herein.

" Dated this 20th day of January, 1976.

MIDDLE ROAD INVESTORS, INC.
By Robert D. Danico, President
By C.J. Munson, Secretary

CITY OF BETTENDORF, IOWA
By William C. Glynn, Mayor
By Margaret W. Lake, Deputy City Clerk"

3. Lot 2 of Block 2 was conveyed to Petitioner Murphy and his wife by Ed Speer Construction, Inc. by Warranty Deed dated February 25, 1994 and filed on March 4, 1994 in the Office of Scott County Recorder as Document No. 7001-94 in full performance on that real estate contract dated June 1, 1979 and recorded on January 23, 1980 in the Office of the Scott County Recorder as Document No. 1155-80. The abstract for the Plot of Lot 2 of Block 2 which is attached as **Exhibit B** and incorporated by reference herein shows that the Defendant Bettendorf was an owner with Middle Road of Block 2 and contains the following certification at page **B-3**, last paragraph:

" NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of Quad City Technological Center shall remain in effect and apply to Lot 2 as platted herein. In addition thereto, each lot owner of Lots in said Block 2 shall share the

common driveways into said Block 2 from Tech Drive and P.U.D. Drive.

" Dated this 1st day of July, 1975.

MIDDLE ROAD INVESTORS, INC.
By Robert D. Danico, President
(Corporate Seal) By C.J. Munson, Secretary

CITY OF BETTENDORF, IOWA
By William C. Glynn, Mayor
(Seal of City of Bettendorf, Iowa)
By James W. Strieck, Clerk"

4. Defendant Planned Parenthood of Greater Iowa, Inc. (hereinafter called "Defendant Planned Parenthood" and "Planned Parenthood") is the present owner of a parcel of land within the metes and bounds of the Planned Unit Development (hereinafter "P.U.D. Zone") known as Quad City Technological Center to the City of Bettendorf, lying between Block 1 and Block 4, the Lot having been purchased by Defendant Planned Parenthood on April 14, 1997. The northern boundary of the Planned Parenthood property abuts and forms the southern boundary of Lot 1, Lot 2 and Lot 3 of Block 4. The southern boundary of the Planned Parenthood property abuts and forms the northern boundary of Block 1, and the northern boundary of the right of way know as Happy Joe Drive, as shown on the two maps which are attached to this Petition as **Exhibit C** and pleaded by incorporation herein. At the time of the platting of Lot 3 of Block 4, it was the expressed intention of Defendant Bettendorf and Defendant Middle Road, as the developers of the Quad City Technological Center to the City of Bettendorf, to place the same "restrictive" and "protective" covenants that were attached to Block 1 on the future development and platting of the P.U.D. Zoned Planned Parenthood property, which was owned in fee simple by Defendant Bettendorf and Defendant Middle Road, so that the "benefits" and "restrictions" on all of

the said Lots in said land development were "reciprocal", as expressed and accomplished in the recording of the platting of Blocks 1 through 6 as a whole, see **Exhibit D** to this Petition (infra, at page **D-3**, the first paragraph and page **D-6**, paragraph 11) and pleaded by incorporation herein. Petitioner avers that the terms of the restrictive and protective covenants were extended by the developer, Defendant Middle Road, for a finite period of 10 years to the year 2003 to provide time to complete the platting of the plan as a whole, so that upon the completion of that land development, each of the lots within the P.U.D. Zone would have and enjoy the same benefits and burdens.

5. By the platting of Lot 3 of Block 4, Petitioner Murphy's property was burdened by the restrictive covenants but did not, at that time, receive the promised reciprocal benefits (the "protective" covenants) from the adjoining Planned Parenthood property the title to which, was thereafter "clouded" by the "equitable protective servitude" which attached to Murphy's land to the north. The "restrictive" and "protective" covenants in the platting of Lot 3, Block 4 are writings which establish a bilateral contract between Defendant Bettendorf and Defendant Middle Road as the developers and Murphy who, by virtue of his purchase of Lot 3, Block 4, joined in the unilateral agreement of Defendant Bettendorf and Defendant Middle Road, who owned the said "P.U.D. Zoned" Planned Parenthood land in fee simple in 1975.

6. The City of Bettendorf is named as a Defendant because of its participation with Middle Road in the draftsmanship and approval of Paragraphs 3 and 11 of the Restrictive (burden) and Protective (benefit) Covenants as noted above and in that part of the Abstract for the Final Plat of Block 1 (see **Exhibit A-2 and A-3** and **Exhibit D** to this Petition at pages **D-1 through D-11**) which reads in part as follows with respect to Paragraphs 3 and 11:

"RESTRICTIVE AND PROTECTIVE COVENANTS

" MIDDLE ROAD INVESTORS, INC., an Iowa Corporation, hereby establish and declare the following restrictive and protective covenants to be applicable to the following described real estate located in Scott County, Iowa, to-wit: All lots in Blocks 1 through 6 of The Planned Unit Development known as Quad City Technological Research Center, to the City of Bettendorf, Iowa, which plat is recorded as Document No. 5134-73 in the office of the Recorder of Scott County, Iowa:

" 1. No building . . . .

"

. . . .

" 3. No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the other lot owners in said addition.

"

. . . .

" 11. These restrictions shall be in force from the date of the Owner's Certificate to which it is an exhibit until January 1, 1993 or until such later date to which the same may be extended as hereinafter provided, and shall run with and be binding upon all lots in said addition, and every part thereof and shall be appurtenant to and for the benefit of all said lot owners. These restrictions shall be automatically extended for an additional ten-year period on January 1, 1993, and each ten year anniversary of said date unless a written instrument signed and acknowledged by the owners of a majority of all the lots in Quad City Technological Center shall prior to such date or anniversary be

recorded with the Recorder of Scott County, Iowa, abrogating or modifying the same in whole or in part to the extent therein set forth. In determining the majority of said lot owners, each lot shall be entitled to one vote to be cast according to the will of a majority in interest of any co-owners having interest therein whether such majority is represented by a majority of the undivided interests in an entire lot or ownership of the greater portion of a subdivided lot. A contract purchaser or life tenant of the legal title shall be deemed the owner. In all other respects, ownership shall refer to record owner ship of legal title." (Our emphasis.)

" 11. Invalidity, abandonment or waiver of any one or more of the same restrictions shall in no wise affect any of the other restrictions, which shall remain in full force and effect.

" 12. In the event any person who may at any time own or occupy any of the numbered lots, or part thereof, in said Addition should violate or threaten to violate any of these restrictions, said Middle Road Investors, Inc. its successors and assigns, and the owners from time to time of any of the numbered lots in said Quad City Technological Center shall have the right to proceed in any court of law or equity, by injunction or otherwise, to enforce performance and restrain violation, or pursue any other remedy to which it or they may be entitled and shall have the right to collect from the party or parties violating or threatening to violate the same, either jointly or severally, all damages, costs, expenses and counsel fees resulting from the violation thereof, or incurred in, or in connection with, said proceedings.

"Dated at Bettendorf, Iowa, this 3rd day of April, 1973.

Middle Road Investors, Inc.
By: Robert D. Danico, President
(Corporate Seal) By: C.J. Munson, Secretary"

7. Thereafter, Middle Road did not plat Block 5 and 6 as planned. Instead, on June 16, 1976 (5 month after the conveyance of Lot 3, Block 4 to Murphy), Defendant Middle Road, without Notice to Murphy, conveyed the Planned Parenthood property by a Warranty Deed to "Robert Versman and Rose Versman, husband and wife, as tenants in common, and to their heirs and assigns." The legal document conveying the real estate, contains an asterisk and the typed instruction reading "subject to restrictive covenants recorded as document 5134-73 S.C. Iowa Rec. Off." which is initialed by Robert D. Danico as President and C.J. Munson, as Secretary of Middle Road, Inc. (see Document 10830-76 at **Exhibit E** to this Petition).

8. 10 years later, on December 23, 1986, Robert H Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 25349-86, recorded on December 31, 1986, at **Exhibit F** to this Petition which contains the typed instruction reading: "Subject to: 1. Easements, covenants and restrictions of record.")

9. On December 24, 1986, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the

Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1735-87, recorded on January 28, 1987 at **Exhibit G** to this Petition which contains the typed instruction reading: "Subject To: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on December 23, 1986, . . . recorded in the Scott County Recorder's office as Document No. 25349-86 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto").

10. On January 3, 1987, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1736-87 recorded on January 28, 1987 at **Exhibit H** to this Petition which contains the typed instruction reading: "Subject to: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on Jan. 2, 1987 recorded in the Scott County Recorders office as Document 165-87 and ratifies and approves

the conveyance of a total of one-half of the real property legally described in Exhibit A hereto.")

11. On April 14, 1997, Kenneth J. Versman and Linda Jean Versman, Husband and Wife, Stuart J. Heller and Judith Lee Heller, Husband and Wife, and Frederick J. Glassman and Frances Belle Glassman, Husband and Wife, conveyed by Warranty Deed the Planned Parenthood property to Planned Parenthood of Greater Iowa, Inc. or Planned Parenthood of Greater Iowa Foundation, Inc. (See Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this Petition (last in order).

PETITIONER MURPHY'S CONTENTIONS

12. An actual controversy has arisen between Petitioner Murphy and Defendants, relating to the legal rights and duties of Defendant Planned Parenthood and Defendant Bettendorf, in respect to said Lots as those rights and duties are affected by Paragraph 3 and Paragraph 11 of the above stated Restrictive (burden) and Protective (benefit) Covenants. Petitioner Murphy contends that Paragraph 11 must be construed against its co-author Defendant Bettendorf and read to extend the Restrictive and Protective Covenants automatically for an additional, finite ten-year period on January 1, 1993 to January 1, 2003 without reference to that language which appears after the "comma" which follows the date "January 1, 1993". It would appear that such "finite" language was adopted to keep the first additional 10-year period extension in compliance with the requirements of **Bettendorf Code §614.24** which was enacted in 1966 and was interpreted by the Iowa Supreme Court in ***Compiano v. Kuntz***, 226 N.W.2d 245 (Iowa 1975) and ***Presbytery of Southeast Iowa v. Harris***, 226 N.W.2d 232, 237-38, 242 (Iowa 1975). Because the "finite" 10-year extension period was accomplished during the first 21-year period and was a recorded document, it met the

requirements of **Bettendorf Code §614.24**, which then read "unless the claimant shall, by himself, or by his attorney or agent . . . . Shall file a verified claim with the recorder of the county wherein such real estate is located within said twenty-one year period".

13. Defendant Bettendorf is a **Home Rule** City in the State of Iowa which is empowered to enact zoning ordinances (i.e., P.U.D. and C-5 Zones) and amendments (zone changes) on real property in the City of Bettendorf, acting by and through the Bettendorf City Council, and to act as "parens patria" on behalf of Petitioner Murphy and other Bettendorf residents (citizens) in defense of their property rights under such zoning ordinances when such zoning rights of the City of Bettendorf are challenged by third parties in a Federal District Court in a Federal Civil Rights action pursuant to **42 U.S.C. §1983**.

14. Such zoning ordinances and zone changes are accomplished by a legislative act by the City Council to accomplish the same. Under the **Doctrine of Separation of Powers**, the general rule is that the Courts cannot write or rewrite the zoning laws, nor force the legislative body to enact or amend a zoning ordinance. An amendment which is adopted in disregard of the protest of property owners who are acting pursuant to a valid "protest" ordinance, is void. The City of Bettendorf is a necessary party in that a Federal Judgment of U.S. District Court Judge Charles R. Wolle in a Federal Civil Rights action brought by Defendant Planned Parenthood, purports to rezone the Planned Parenthood property (P.U.D. Zone to C-5 Zone). Under the **Doctrine of Separation of Powers**, the general rule is that a federal court has no power (lack of subject matter jurisdiction) to rezone real property in the City of Bettendorf, which function (zoning), under the U.S. Supreme Court decision in ***Huffman v. Pursue, Ltd.***, infra., must be held to be both a "municipal affair" and an "important state matter" which is protected by the **11th Amendment**.

15. Defendant Planned Parenthood wishes to construct a clinic in Bettendorf, Iowa which will cater to the "abortion" trade. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 zone. Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose to purchase a property in a P.U.D. Zone (which was surrounded by and within 200 feet of three relatively new residential apartment complexes on Lots 1, 2, and 3 of Block 4 which were benefitted by a **Bettendorf "Protest" Ordinance**) and submitted an application for a Zone Change by ordinance to C-5.

16. The adjacent apartment owners (see **Exhibit C**– Murphy and Jecklin) and Larry Whitty, the owner of Lot 1, Block 1 objected and made a successful statutory protest (**20% Rule**) against the zone change (being within 200 feet of the Planned Parenthood property), pursuant to **Bettendorf Zoning Code §24.2** and **§24.4**, which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the zone change. The City Council on March 16, 1996, voted 5-1 not to adopt the C-5 Zoning ordinance.

17. Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The 8th Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983). Under Iowa case law, a City Council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by Writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If such an appeal is not filed within 30 days, the City Council's actions become final under Iowa law, in which case, under the **11th Amendment** and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman*** (***University of Tennessee v. Elliott***, 470 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 [1986],

and ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 70 L.Ed.2d 56, 104 S.Ct. 892 [1984], and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8th 1995]), the City Council's quasi-judicial order also becomes final and ***Res Judicata*** under Federal law, because the federal courts are required to give this ***Res Judicata*** Rule the same interpretation given it by the state court.

18. On March 21, 1997, one year and two days after the City Council's denial of the zoning change, Defendant Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court (pleading what is, in essence, an appeal from the Bettendorf City Council's quasi-judicial Order denying the C-5 zoning Application). Planned Parenthood did not name as defendants the adjacent apartment owners and Larry Whitty, who made the successful statutory protest.

19. The City of Bettendorf filed a Motion for a Partial Summary Judgment, pursuant to the **11th Amendment** and the ***Res Judicata*** **Doctrine**. U.S. District Judge Charles R. Wolle (egregiously) denied the city's ***Res Judicata*** Plea. Upon the conclusion of the Federal trial, Judge Wolle entered a judgment which purported to rezone the property to C-5 Zoning.

20. Petitioner Murphy timely moved to intervene (immediately after the City of Bettendorf announced its decision not to act as "***parens patria***" and pursue an appeal from the Judgment of U.S. District Court Judge Wolle), and within the appeal time period, for the purpose of appealing U.S. District Court Judge Wolle's Judgment on **11th Amendment** (lack of subject matter) jurisdictional and other grounds, including his denial of Bettendorf's Summary Judgement Motion on a plea of ***Res Judicata***.

21. U.S. District Court Judge Wolle ruled (cursorily

and egregiously) on Petitioner Murphy's extensive pleadings: (1) that the Intervention Motion was "untimely", (2) refused to address the merits of Petitioner's right to mandatory intervention, and the **11th Amendment** Jurisdictional and ***Res Judicata*** issues raised by Murphy at the time of Murphy's Intervention Motion, and (3) further refused to set such matters for oral argument.

22. In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two separate forms: by the filing of a direct appeal and by the filing of a verified complaint in an original Petition for Writ of Mandamus in the 8th Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

23. In a highly unorthodox ruling, the Court of Appeals treated the Appellant's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus as though they had been consolidated, and in a brief single order, denied the Petition for Writ of Mandamus without an opinion and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals thereafter also denied a Petition for Rehearing and Suggestion for Rehearing En Banc in each of the two cases. The U.S. Supreme Court refused to issue its discretionary Writ of Certiorari to review such erroneous rulings.

24. Petitioner Murphy contends that the **11th Amendment** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control this litigation and that both of the Federal Courts were in error in their refusal to address the issue of "lack of subject matter jurisdiction" of the Federal Courts under the **11th Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998), at **Point III** (duty to address the questions of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the

matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S 139, 113 S.Ct. 684 (1993) (creating a new **Rule of Court** re the issue "lack of subject matter jurisdiction"), ***Wisconsin Dept. of Correction v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, 118 S.Ct. ___, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. District Court***, 426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119 (1976); ***Will v. U.S.***, 389 U.S 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967); and **Supreme Court Practice**, 7th Ed., Stern, Gressman Shapiro, Geller, at page 495.

25. Plaintiff Murphy further contends: (1) that he is entitled to a Declaratory Judgment in the District Court of Iowa which holds that, under Iowa Law, the Bettendorf City Council's action on the above zone change is a "judicial" function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted; (2) that the record shows that the adjacent apartment owners made a successful statutory protest which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the Zone Change, and that the City Council on March 19, 1996 voted 5-1 not to adopt the C-5 Zoning Ordinance; (3) that pursuant to such successful protest, the adjacent apartment owners acquired "**vested rights**" in the City Council's Final Order (judgment); and (4) that the City Council's final order which denied the C-5 Zoning Application was and is a final judgment which, under Iowa law and the **Constitutional Doctrine of *Res Judicata*** was and is entitled to recognition by the U.S. District Court, the 8TH Circuit Court of Appeals and the U.S. Supreme Court.

26. Murphy believes and avers that the Bettendorf City Attorney, Greg Jaeger, will acknowledge on behalf of the

Defendant Bettendorf: (1) that the adjacent property owners did make a successful protest under the **Bettendorf "Protest" Ordinance**, which reads as follows:

> "24.4 In case the commission does not approve the proposal or in case of a protest against such change signed by twenty (20) percent or more of one or more of the following groups:
>
> " (a) Property owners of the lots included in such proposed change.
>
> " (b) Property owners immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).
>
> " (c) Property owners immediately adjacent in the front thereof extending the depth of one lot or not to exceed two (200) feet therefrom (excluding street right-of-way).
>
> " (d) Property owners immediately adjacent to any and all sides (including the front and rear sides) of the proposed change extending one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).
>
> " Such amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all the members of council.";

(2) that the **"Protest" Ordinance** is constitutionally valid and was validly applied; and (3) that the **Doctrine of *Res Judicata***

as pleaded by Defendant Bettendorf in the Federal Civil Rights lawsuit did, in fact, require that the Civil Rights action which was filed in the U.S. District Court be dismissed for lack of subject matter jurisdiction under the 11th **Amendment** and ***Huffman***, supra.

27. Murphy further avers that, upon the successful termination of the Declaratory Judgment proceedings before this Court, Plaintiff intends to file a Declaratory Judgment Action in the U.S. District Court to have Judge Wolle's Judgment vacated on the ground that the Federal District Court lacked **Article 3, §2** subject matter jurisdiction under the 11th **Amendment**, and the U.S. Supreme Court's ***Huffman*** **Abstention Doctrine**, ***Rooker-Feldman*** **Abstention Doctrine**, ***Res Judicata*** **Doctrine**, and the ***Stare Decisis*** **Doctrine**, and for other reasons which have been made of record in the U.S. District Court, the U.S. Court of Appeals for the 8th Circuit, and the U.S. Supreme Court; and if necessary, will petition the U.S. Supreme Court for a Writ of Certiorari on the 11th **Amendment** issue and Substantial Federal Questions which have been presented to the U.S. Supreme Court by the conflict in the determination of this issue by the State of Iowa and Federal Judiciary. See, in this regard, the copy of the pleadings on file in the U.S. Court of Appeals for the 8th Circuit and in the U.S. Supreme Court which are being lodged concurrently with the Clerk of this Court by Petitioner Murphy.

28. No other adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined; in that (1) U.S. District Court Judge Wolle has egregiously (willfully, knowingly and wrongfully) denied Petitioner Murphy's lawful right to intervene in the Federal Civil Rights action of Defendant Planned Parenthood, as an indispensable party; in order that he might appeal the (egregiously) erroneous judgment of Judge Wolle which created the opportunity for Planned Parenthood to engage in a course of conduct which constitutes a breach of **Bettendorf Zoning**

Code §24.2 and **§24.4** and Paragraph 3 of the Restrictive and Protective Covenants; (2) the Court of Appeals for the 8th Circuit refused to entertain Petitioner Murphy's appeal from Judge Wolle's erroneous judgment and a Petition for Writ of Mandate; and (3) the U.S. Supreme Court refused to exercise its discretionary review of the Federal Court record by Writ of Certiorari. Because Murphy was wrongfully denied the right to intervene in the Federal Civil Rights lawsuit, he is not bound by Judge Wolle's Judgment in the Civil Rights action under the **Doctrine of *Res Judicata***; see ***International Union v. Scofield*** 382 U.S. 205, 15 L.Ed.2d 272 (1965).

29. Murphy avers and contends that the Restrictive and Protective Covenants which were established by the Defendant Middle Road Investors, Inc. on April 3, 1973 at the time of the platting of Block 1 (see Petition at **Exhibit D-1** through **D-11**) and re-established and confirmed by the Defendant Middle Road Investors, Inc. on January 20, 1976 as the owner and proprietor of Lot 3 of Block 4, as set forth at **Exhibit A-2** and **A-3** to this Petition, run with the land and were fully operational and binding on all parties during the period January 20, 1976 through January 1, 1993; and on that date were automatically extended for an additional ten year period from January 1, 1993 through January 1, 2003 by the provision of paragraph 11 of the Restrictive and Protective Covenants (see **Exhibit D-6** and **D-7**) and were and are presently operative and binding on all parties, including the Defendant Planned Parenthood of Greater Iowa, Inc. from and after April 14, 1997, when Planned Parenthood received title to such property by Warranty Deed from Kenneth J. Versman, etc. (see Petition at paragraph 11 on page 6 of the Petition and Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this Petition [last in order]).

30. Defendant Planned Parenthood's projected use of such property in the face of the successful protest of the Bettendorf residents adjoining such property under **Bettendorf**

"Protest" Zoning Code §24.2 and **§24.4** constitutes an immediate and continuing breach of Paragraph 3 of the Restrictive and Protective Covenants which requires that "No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be, or become, an annoyance or nuisance to the other lot owners in said addition." (Our emphasis.)

31. Petitioner has no adequate remedy at law to compensate for the harm to the reputation and contemporary community standards of the City of Bettendorf, Iowa which flows from the knowledge of the general public that land in Bettendorf, Iowa, a Home Rule City, which is adjacent and within 200 feet of an existing residential neighborhood is being used for the conduct of early abortions, late term abortions, and partial birth abortions also known and referred to as "infanticide". Under these facts and circumstances, and upon this record, Defendant Planned Parenthood must be held to be engaged in a trade which is "obnoxious" and "offensive" as a matter of law under the terms of paragraph 3 of the Restrictive and Protective Covenants (see **Exhibit D-5** to this Petition); and is both a public and private nuisance under the **English Common Law**, the early **American Common Law**, the **Statutes of the State of Iowa** and the **"Protest" Zoning Code, §24.2** and **§24.4** of the City of Bettendorf. The Defendant's continuous breach of said Covenant and maintenance of a public and private nuisance will result in irreparable harm to the value of Petitioner's land and the pecuniary amount of such damage, which is impossible to ascertain, warrants the issuance of a preliminary injunction.

QUESTIONS PRESENTED FOR THE IOWA DISTRICT COURT ON THIS PETITION FOR A DECLARATORY JUDGMENT.

1. Whether **Bettendorf Zoning Code §24.2**

and §24.4 are constitutional on their face?

2. Whether the order of the Bettendorf City Council which denied the Planned Parenthood Zone Change Application from P.U.D. to C-5 zoning by a 5-1 vote is ***Res Judicata*** under Iowa law because Planned Parenthood did not timely appeal such order to the Iowa District Court by Writ of Certiorari?

3. Whether that part of the record which shows that three of the adjacent property owners (Clarence Murphy [Petitioner], owner of Lot 3, Block 4, Lois Jecklin, owner of Lots 1 and 2 of Block 4, and Larry Whitty, owner of Lot 1, Block 1) made a successful statutory protest under **Bettendorf Zoning Code §24.2** and **§24.4**, mandates a ruling by this Court that the zoning on the Planned Parenthood property under Iowa law is "P.U.D." and remains as "P.U.D."?

CONCLUSION

The complex propositions of Iowa Zoning law which are framed by this Petition provide irrefutable, positive proof: (1) that legal issues involving the zoning laws of a state are "important state matters" which are protected by the **11th Amendment** and the ***Huffman*** **Abstention Doctrine**, and (2) that a U.S. District Judge lacks "subject matter jurisdiction" of such issues which, according to the laws of probability, will be decided differently for each state based upon the Judicial Policy of the state which is affected. The U.S. Supreme Court has held in the ***Huffman*** cases that, pursuant to the ***Res Judicata*** **Doctrine**, the U.S. District Court must extend to such State Court judgments the interpretation given by the State Court Judiciary (the equivalent of the "**Full Faith and Credit**" provision of the **Federal Constitution** which governs the responsibility of the Judiciary of State Courts to acknowledge the judgments of the Judiciary of other State Courts).

WHEREFORE, Petitioner prays that judgment be entered against the Defendants:

1. For a Declaration, pursuant to Iowa Law, that the Bettendorf City Council's action on Planned Parenthood's Zone Change Application from PUD to C-5 Zoning is a judicial function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted on such Application; that the record shows that the **"Protest" Ordinance** is constitutional and was applied in a constitutional manner; that pursuant to said successful protest, the adjacent property owners acquired **"vested rights"** in the City Council's Final Order (judgment); that the City Council's denial of the C-5 Zoning Application, under the constitutional **Doctrine of *Res Judicata*** is a Final Judgment and that the Zoning on the Planned Parenthood property under Iowa law is "P.U.D." as enacted by the Bettendorf City Council.

2. That during the pendency of this action, a preliminary injunction issue to enjoin and restrain the Defendant Planned Parenthood from the acts and conduct aforesaid.

3. That the Defendant Planned Parenthood be restrained and enjoined from violating and continuing to violate and breach **Bettendorf "Protest" Ordinance §24.2** and **§24.4** and Paragraph 3 of the Protective Covenants that runs with Lot 3 of Block 4 during the time the same is to remain in force and effect;

4. For costs, and attorneys fees and other relief as provided above; and

5. For such other and further relief as the Court

may deem proper.

DATED: January ___, 2000

Respectfully submitted,

_____

Clarence J. Murphy, Plaintiff

VERIFICATION

State of California)
} SS:
Los Angeles County)

Declaration under Penalty of Perjury, Pursuant To California Code of Civil Procedure §2015.5

I am the attorney for Plaintiff Clarence J. Murphy and as such attorney, the facts as pleaded in the above Petition are more fully known to me. I therefore make this Declaration and declare under penalty of perjury under the laws of California that the forgoing **First Amended Petition for a Declaratory Judgment and an Injunction** is true and correct.

Dated: January 31, 2000
Location: 9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221

/S/

James J. Clancy, California Bar No. 26946
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221
(818) 352-2069 Fax: (818) 352-6549

Attorney for Petitioner Clarence J. Murphy

CONTINUATION OF ABSTRACT OF TITLE

To

Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa.

From December 26, 1975 at 5 o'clock P.M. to and including February 4, 1976 at 5 o'clock P.M.

No. 50.

MIDDLE ROAD INVESTORS, INC., and CITY OF BETTENDORF, IOWA,	)	PLAT OF LOT 3 OF BLOCK 4 OF QUAD CITY TECHNOLOGICAL CENTER, A PLANNED UNIT DEVELOPMENT TO THE CITY OF BETTENDORF, IOWA.
To	)	
THE PUBLIC.	)	Dated: Jan. 20, 1976. Ack'd: Jan. 20, 1976. Filed: Feb. 4, 1976. Rec'd: Doc. #1873-76.

SURVEYOR'S CERTIFICATE:

I, Dale E. Christensen, hereby certify that I am a duly registered Land Surveyor under the laws of the State of Iowa and that I have surveyed a tract of land to be named Lot 3 of Block 4 of Quad City Technological Center to the City of Bettendorf, Scott County, Iowa, more particularly described as follows:

Commencing at the Northeast corner of the Northeast Quarter of said Section 21; thence due South, along the East line of the Northeast Quarter of said Section 21, a distance of 744.06 feet to a point on the Northerly R.O.W. of P.U.D. Drive; thence South 71° 25' 13" West, along the Northerly R.O.W. of P.U.D. Drive, a distance of 291.00 feet to a point of curvature; thence Northwesterly along a 15.00 foot radius curve concave Northeasterly a distance of 22.31 feet to a point of reverse curvature on the Northeasterly R.O.W. of Tech Drive; thence Northwesterly along a 476.00 foot radius curve concave Southwesterly and along the Northeasterly R.O.W. of Tech Drive, a distance of 88.54 feet to a point of tangency; thence North 34° 01' 36" West, along the Northeasterly R.O.W. of Tech Drive, a distance of 108.31 feet; thence South 55° 58' 24" West a distance of 52.00 feet to a point on the Southwesterly R.L.W. of Tech Drive also being

EXHIBIT A-1

the point of beginning; thence South 34° 01' 36" East, along the Southwesterly R.O.W. of Tech Drive, a distance of 26.31 feet; thence South 44° 56' 49" West a distance of 351.90 feet; thence North 54° 19' 09" West a distance of 127.67 feet; thence North 44° 56' 49" East a distance of 388.31 feet to a point on the Southwesterly R.O.W. of Tech Drive; thence Southeasterly along a 594.00 foot radius curve concave Southwesterly and along the Southwesterly R.O.W. of Tech Drive, a distance of 100.90 feet to the point of beginning containing 1.077 acres.

Dated this 14th day of January, 1976 in Davenport, Scott County, Iowa.

(Surveyor's Seal)

Dale E. Christensen Date: 1/14/76
Ia. Reg. #5493
Collehon, Schemmer & Assoc., Inc.

DEDICATION OF OWNERS:

This is to certify that the attached Plat of Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development in and for the City of Bettendorf, Iowa is hereby made with the free consent of Middle Road Investors, Inc., and the City of Bettendorf, Iowa, as owners and proprietors of the real estate described upon the attached and foregoing plat and the Surveyors Certificate attached thereto and certifies that said Plat is made in accordance with the desire of said proprietors and said proprietors do hereby dedicate to the use of the public any and all rights it may have in and to all streets as shown on said plat.

Front yard building setback lines are hereby established as shown on the plat, between which lines and the property lines of the street, there shall be erected or maintained no buildings or structures.

A perpetual easement is hereby granted to any local public utility, cable T.V. or municipal department, their successors and assigns, within the area shown on the plat and marked "Easement" to install, lay construct, renew, operate, maintain and remove conduits, cables, pipes, poles and wires (underground), with all necessary braces, guys, anchors and other equipment for the purpose of serving

EXHIBIT A-2

the subdivision and other property with the telephone, electric and gas, cable T.V., sewer and water service as a part of the respective utility systems; also is granted, subject to the prior rights of the public therein, the right to use the streets and lots with underground service wires to serve adjacent lots and street lights, the right to cut down and remove or trim and keep trimmed any trees or shrubs that interfere or threaten to interfere with any of the said public utility equipment, and the right is hereby granted to enter upon the lots at all times for all of the purposes aforesaid. No permanent buildings or trees shall be placed on said area as shown on the plat and marked "Easement", but same may be used for gardens, shrubs, landscaping and other purposes that do not then or later interfere with the aforesaid uses or the rights herein granted.

NOW THEREFORE, Middle Road Investors, Inc. and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 1[illegible] 1973, as Document #5134-A with the platting of Block 4 of Quad City Technological Center shall remain in effect and apply to Lot 3 of Block 4 as platted herein.

Dated this 20th day of January, 1976.

MIDDLE ROAD INVESTORS, INC.

By Robert D. Danico
President

By C. J. Munson
Secretary

CITY OF BETTENDORF, IOWA

By William C. Glynn
Mayor

By Margaret W. Lake
Deputy City Clerk

EXHIBIT A-3

STATE OF IOWA)
) ss:
COUNTY OF SCOTT)

On this 20th day of January, 1976, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Robert D. Danico and C. J. Munson, to me personally known who being by me duly sworn, did say that they are the President and Secretary respectively of said corporation and that the seal affixed thereto is the seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and that the said Robert D. Danico and C. J. Munson, as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation by it and by them voluntarily executed.

(Notarial Seal)

Judith L. Moore
Notary Public in the State of Iowa

STATE OF IOWA)
) ss:
COUNTY OF SCOTT)

On this 20 day of January, 1976, before me the undersigned, a Notary Public in and for said County, personally appeared William C. Glynn and Margaret W. Lake, each to me personally known, who being by me duly sworn, did say that they are the Mayor and Deputy City Clerk, respectively, of said City of Bettendorf, a Municipal Corporation, of Scott County in the State of Iowa; that the seal affixed to the said instrument is the seal of said corporation by authority of its City Council; and the said William C. Glynn and Margaret W. Lake each acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by each of them and by it voluntarily executed.

(Notarial Seal)

Russell Ellis
Notary Public in the State of Iowa

EXHIBIT A-1

CERTIFICATE OF COUNTY TREASURER:

I, Ken W. Gaines, Treasurer of Scott County, Iowa, hereby certify that the land laid out into a Planned Unit Development covered by the Plat hereto attached, known and designated as Lot 3 of Block 4 of Quad City Technological Center to the City of Bettendorf, Iowa, is free from taxes payable to Scott County, Iowa, except for special assessments for sewer and paving.

Witness my hand this 20th day of January, 1976.

Ken W. Gaines, Treasurer

By Myrtle Wertz
Deputy

CERTIFICATE OF ATTORNEY AT LAW:

I, John S. Gosma, Attorney at Law, a member of the firm of Doerr, Rehling and Lindburg, do hereby certify that I have examined the abstract of title to the land embraced in the attached plat and described in the accompanying certificate of Dale E. Christensen, registered land surveyor, and from such examination find that the City of Bettendorf, Iowa, has good fee simple title to said real estate subject to a contract to Middle Road Investors, Inc., and that said land is free from encumbrances, except for sewer and paving assessments.

Dated at Davenport, Iowa, this 20th day of January, 1976.

DOERR, REHLING AND LINDBURG

By John S. Gosma

EXHIBIT A-5

CERTIFICATE OF COUNTY RECORDER:

I, Richard F. Hagen, Recorder of Scott County, Iowa, do hereby certify that the title in fee to the land covered by the plat hereto attached, known and designated as Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, is in the City of Bettendorf, Iowa, and Middle Road Investors, Inc., and that said title is free from encumbrances.

Witness my hand and seal of my office hereunto affixed this 20 day of January, 1976.

Richard F. Hagen
Recorder

CERTIFICATE OF CLERK OF DISTRICT COURT:

I, David H. Dahlin, Clerk of the District Court of the State of Iowa in and for Scott County, hereby certify that the land covered by the annexed plat known and designated as Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development, to the City of Bettendorf, Iowa, is free from all judgments, attachments, mechanic's liens, or other liens, as appears by the records of my office.

Witness my hand and the official seal of my office, this 20 day of January, 1976.

David H. Dahlin
Clerk

By Marie H. Lemburg
Deputy

EXHIBIT A-6

ACCEPTANCE BY CITY OF BETTENDORF, IOWA:

We, the undersigned, William C. Glynn, Mayor, and James W. Strieck, City Clerk of the City of Bettendorf, Iowa, do hereby certify that the following resolution was passed and adopted by the City Council of the City of Bettendorf, Iowa, on the 20th day of January, 1976, and duly approved on the same day by the Mayor of said City:

RESOLUTION OF ACCEPTANCE
BY CITY OF BETTENDORF

Resolved by the City Council of the City of Bettendorf:

That the Final Plat of Lot 3 of Block 4, of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, as filed with the City Clerk of said City by Middle Road Investors, Inc. and the City of Bettendorf, Iowa be and the same is hereby approved and accepted; and that the Mayor and City Clerk be and they are hereby authorized and instructed to certify to the adoption of this resolution upon said plat as required by law.

Witness our hands and the seal of the City of Bettendorf, Iowa, impressed hereon, this 20th day of January, 1976.

William C. Glynn
Mayor of the City of Bettendorf, Iowa

Margaret W. Lake
Deputy Clerk of the City of
Bettendorf, Iowa.

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EXHIBIT A-7

No. 51.

MIDDLE ROAD INVESTORS, INC.,

To

CITY OF BETTENDORF, IOWA.

ASSESSMENT WAIVER.

Dated: Jan. 20, 1976.
Ack'd: Jan. 20, 1976.
Filed: Feb. 4, 1976.
Rec'd: Doc. #1874-76.

Recites that Middle Road Investors, Inc. has this date filed with the Clerk of the City of Bettendorf, Iowa, a Plat for Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development in the City of Bettendorf, Iowa.

Recites that it is agreed by Middle Road Investors, Inc. that at such time as sidewalks or other conventional type of subdivision improvements are needed, the City of Bettendorf, Iowa, shall install said improvements and assess the cost of the same in the prescribed manner against the property comprising said Lot 3 of Block 4 of Quad City Technological Center in accordance with the local requirements regarding special assessments.

Said Middle Road Investors, Inc., being the sole owner of Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, hereby waives all notices and rights of protest to the ordering of said improvements and assessing the cost thereof against the subdivided property even though the cost thereof may exceed the amount that can legally be assessed by the City of Bettendorf, Iowa, against the subdivided property and agree to be responsible for such differences and agree to permit the assessment of the entire cost of all of said improvements against the subdivided property. This waiver shall become null and void at the time the original subdivision improvements are completed and accepted by the City.

Executed for Middle Road Investors, Inc. by Robert D. Danico, President, and C. J. Munson, Secretary, with corporate seal affixed.

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EXHIBIT A-8

No. 52.

There are no Judgments in the District Court of the State of Iowa in and for Scott County against City of Bettendorf, Iowa or Middle Road Investors, Inc. during the period covered herein; and there are no Mechanic's Liens, Encumbrances or Suits Pending affecting the title to the real estate under examination to which said City or said corporation is party, except as shown herein.

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No. 53.

T A X E S

COUNTY, STATE and CITY OF BETTENDORF:

1974 - Paid.

Block 4 Quad City Technological Canter:
Paving Assessment
426,348 square feet-Total Assessment
$63,516.84.

Sanitary Sewer Assessment
426,348 square feet -Total Assessment
$7,194.90.

NO FURTHER SPECIAL ASSESSMENTS.

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EXHIBIT A-9

CERTIFICATE

We, Vollertsen & Britt, P.C., hereby certify that the foregoing is a true and correct Continuation of Abstract of Title to the real estate described in the caption thereof, from December 26, 1975 at 5 o'clock P.M. to and including February 4, 1976 at 5 o'clock P.M. as shown by the records of Scott County, Iowa.

We further certify that there are no Judgments, Suits Pending, Bankruptcy Proceedings, Notices of Tax Liens or Other Liens in the District Court of the United States for the Southern District of Iowa, Davenport Division, affecting the title to the real estate under examination during the period covered herein.

Dated at Davenport, Iowa, this 4th day of February, 1976 at 5 o'clock P.M.

VOLLERTSEN & BRITT, P.C.

By Dennis J. Britt

Attorneys and Abstracters.

EXHIBIT A-10

CONTINUATION OF ABSTRACT OF TITLE

To

Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Scott County, Iowa; from February 4, 1976 at 5 o'clock P.M. to and including February 24, 1976 at 11:30 o'clock A.M.

No. 54.

THE CITY OF BETTENDORF, IOWA, a minicipal corporation,

To

MIDDLE ROAD INVESTORS, INC.

WARRANTY DEED.

Dated: Jan. 30, 1976.
Ack'd: Jan. 30, 1976.
Filed: Feb. 18, 1976.
Rec'd: Doc. #2523-76.
Cons.: $1.00 & O.V.C.

Conveys real estate situated in Scott County, Iowa, and described as follows: Lot 3 of Block 4 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa.

Recites that this conveyance is executed in partial performance of a contract dated November 7, 1972, and recorded as Document #1947-73, records of the office of the Recorder of Scott County, Iowa.

Recites that the lien of special assessments for the subdivision improvements mentioned in said contract are hereby released against the above described real estate with the liens to remain against the remaining property not yet conveyed. Also released against said block 4 are the special assessments for Middle Road sidewalks and Maplecrest Paving.

Recites that this conveyance is exempt from transfer tax.

EXHIBIT A-11

Executed for grantor corporation by William C. Glynn, Mayor, and by James W. Strieck, City Clerk, with corporate seal affixed.

In the certificate of acknowledgment it is certified that said parties under oath stated that they are the Mayor and City Clerk, respectively, of grantor corporation, that the seal affixed is the corporate seal of said corporation; that they executed foregoing instrument as such officers in behalf of said corporation with authority of its Board of Directors as the voluntary act and deed of said corporation.

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No. 55.

MIDDLE ROAD INVESTORS, INC.,	)	WARRANTY DEED.
	)	
	)	Dated: Jan. 30, 1976.
To	)	Ack'd: Jan. 30, 1976.
	)	Filed: Feb. 18, 1976.
	)	Rec'd: Doc. #2524-76.
CLARENCE F. MURPHY and HWA CHA MURPHY, Husband and Wife, as joint tenants with full right of survivorship, and not as tenants in common.	)	Cons.: $1.00 & O.V.C.

Conveys real estate situated in Scott County, Iowa, and described as follows: Lot 3 and Block 4 of Quad City Technological Center a Planned Unit Development to the City of Bettendorf. Iowa

Executed for grantor corporation by Robert D. Danico, President, and by C. J. Munson, Secretary, with corporate seal affixed.

In the certificate of acknowledgment it is certified that said parties under oath stated that they are the President and Secretary, respectively, of grantor corporation, that the seal affixed is the corporate seal of said corporation; that they executed foregoing instrument as such officers in behalf of said corporation with authority of its Board of Directors as the voluntary act and deed of said corporation.

$26.95 Iowa Transfer Stamps affixed and cancelled.

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EXHIBIT A-12

No. 56.

CLARENCE F. MURPHY and
NWA CHA MURPHY, Husband
and Wife,

To

FIRST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF MOLINE,
ILLINOIS.

MORTGAGE.

Dated: Feb. 20, 1976.
Ack'd: Feb. 20, 1976.
Filed: Feb. 24, 1976.
Rec'd: Doc. #2824-76.
Cons.: $180,000.00.

Mortgages real estate situated in Scott County, Iowa, and described as follows: Lot Number Three (3) in Block Number Four (4) Quad City Technological Center, situated in the City of Bettendorf.

Executed to secure payment of the sum of $180,000.00, with interest thereon, payable in monthly installments of $1605.00 each, commencing September 1, 1976, and due according to the terms of a promissory note of even date, herewith.

Recites that any transfer of real estate covered by this mortgage, or any part thereof, shall give mortgagee the right to declare all indebtedness secured by this mortgage immediately due and payable.

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EXHIBIT A-13

No. 57.

There are no Judgments in the District Court of the State of Iowa in and for Scott County against City of Bettendorf, Iowa or Middle Road Investors, Inc. during the period covered herein, and none against Clarence F. Murphy or Hwa Cha Murphy during the ten years immediately preceding this date; and there are no Mechanic's Liens, Encumbrances or Suits Pending affecting the title to the real estate under examination to which either of said corporations or either of said persons are party, except as shown herein.

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No. 58.

T A X E S

COUNTY, STATE AND CITY OF BETTENDORF:

(Includes other real estate)

1974 - 1st Installment Paid,
2nd Installment, Unpaid, $1844.51

NO FURTHER SPECIAL ASSESSMENTS.

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EXHIBIT A-14

C E R T I F I C A T E

We, Vollertsen & Britt, P.C., hereby certify that the foregoing is a true and correct Continuation of Abstract of Title to the real estate described in the caption thereof, from February 4, 1976 at 5 o'clock P.M. to and including February 24, 1976 at 11:30 o'clock A.M. as shown by the records of Scott County, Iowa.

We further certify that there are no Judgments, Suits Pending, Bankruptcy Proceedings, Notices of Tax Liens or Other Liens in the District Court of the United States for the Southern District of Iowa, Davenport Division, affecting the title to the real estate under examination during the ten years immediately preceding this date.

Dated at Davenport, Iowa, this 24th day of February, 1976 at 11:30 o'clock A.M.

VOLLERTSEN & BRITT, P.C.

By Anton J Sieck
Attorneys and Abstracters

EXHIBIT A-15

No. 40.

MIDDLE ROAD INVESTORS, INC. and CITY OF BETTENDORF, IOWA,	PLAT OF BLOCK 2 OF QUAD CITY TECHNOLOGICAL CENTER, INC.,A PLANNED UNIT DEVELOPMENT TO THE CITY OF BETTENDORF, IOWA.
To	
THE PUBLIC.	Dated: July 1, 1975. Ack'd: July 1, 1975. Filed: July 18, 1975. Rec'd: Doc.#11038-75.

SURVEYOR'S CERTIFICATE:

I, Dale E. Christensen, hereby certify that I am a duly licensed Professional engineer and Land Surveyor in and for the State of Iowa and that I have surveyed and prepared the attached plat, which truly and correctly represents the survey of a tract of land to be named Block 2 of Quad City Technological Center, a Planned Unit Development in and for the City of Bettendorf, Iowa, being a subdivision of the Northeast Quarter of Section 21, Township 78 North, Range 4 East of the 5th P.M. in Bettendorf, Scott County, Iowa, more particularly described as follows:

Commencing at the Northeast corner of the Northeast Quarter of said Section 21; thence due South along the East line of the Northeast Quarter of said Section 21, a distance of 798.92 feet to the point of beginning; thence continuing due South a distance of 766.01 feet to a point on the Northerly ROW of Middle Road; thence South 53° 46' 45" West along the Northerly ROW of Middle Road a distance of 85.12 feet to a point of curvature; thence Westerly along a 15.00 foot radius curve concave Northerly, a distance of 23.32 feet; thence Northwesterly along a 919.45 foot radius curve concave Southwesterly being the Northerly ROW of Commerce Drive, a distance of 313.21 feet; thence Northerly along a 15.00 foot radius curve concave Easterly, a distance of 22.72 feet; thence Northeasterly along a 558.75 foot radius curve concave Northwesterly, being the Easterly ROW of Tech Drive, a distance of 193.38 feet; thence due North along said Easterly ROW of Tech Drive a distance of 181.26 feet to a point of curvature; thence Northerly along a 276.00 foot radius curve concave Westerly a distance of 114.56 feet; thence Northeasterly along a 15.00 foot radius curve concave Southeasterly a distance of 22.31 feet to a point of tangency; thence North 71° 25' 13" East, along the Southerly ROW of P.U.D.

EXHIBIT B-1

Drive, a distance of 273.52 feet to the point of beginning containing 4.326 acres.

Dated this 3rd day of July, 1975 in Bettendorf, Scott County, Iowa.

Dale E. Christensen
Ia. Reg. #5493
Gollehon, Schemmer & Associates, Inc.

(Surveyor's Seal)

DEDICATION OF OWNERS:

This is to certify that the attached Plat of Block 2 of Quad City Technological Center, a Planned United Development in and for the City of Bettendorf, Iowa is hereby made with the free consent of Middle Road Investors, Inc. and the City of Bettendorf, Iowa, as owners and proprietors of the real estate described upon the attached and foregoing plat and the Surveyors Certificate attached thereto and certifies that said Plat is made in accordance with the desire of said proprietors and said proprietors do hereby dedicate to the use of the public any and all rights it may have in and to all streets as shown on said Plat.

Front yard building setback lines are hereby established as shown on the plat, between which lines and the property lines of the street, there shall be erected or maintained no buildings or structures.

A perpetual easement is hereby granted to any local public utility, cable T.V. or municipal department, their successors and assigns, within the area shown on the plat and marked "Easement" to install, lay, construct, renew, operate, maintain and remove conduits, cables, pipes, poles and wires (underground), with all necessary braces, guys, anchors and other equipment for the purpose of serving the subdivision and other property with the telephone, electric and gas, cable T.V., sewer and water service as a part of the respective utility systems: also is granted, subject to the prior rights of the public therein, the right to use the str

EXHIBIT B-2

with underground service wires to serve adjacent lots and street lights, the right to cut down and remove or trim and keep trimmed any trees or shrubs that interfere or threaten to interfere with any of the said public utility equipment, and the right is hereby granted to enter upon the lots at all times for all of the purposes aforesaid... No permanent buildings or trees shall be placed on said area as shown on the plat and marked "Easement", but same may be used for gardens, shrubs, landscaping and other purposes that do not then or later interfere with the aforesaid uses or the rights herein granted.

NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973 as Document #5134-73 with the platting of Block 1 of Quad City Technoligical Center shall remain in effect and apply to Block 2 as platted herein. In addition thereto, each lot owner of Lots in said Block 2 shall share the common driveways into said Block 2 from Tech Drive and P.U.D. Drive.

Dated this 1st day of July, 1975.

MIDDLE ROAD INVESTORS, INC.

By: Robert D. Danico, President

(Corporate Seal)

By: C. J. Munson, Secretary

CITY OF BETTENDORF, IOWA

By: William C. Glynn, Mayor

(Seal of City of Bettendorf, Iowa)

By: James W. Strieck, Clerk

EXHIBIT B-3

STATE OF IOWA)
) SS:
SCOTT COUNTY)

On this 1st day of July, A.D., 1975, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Robert D. Danico and C. J. Munson, to me personally known who being by me duly sworn, did say that they are the President and Secretary respectively of said corporation and that the seal affixed thereto is the seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and that the said Robert D. Danico and C. J. Munson, as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation by it and by them voluntarily executed.

Judith L. Moore
Notary Public in and for Scott County, Iowa

(Notarial Seal)

STATE OF IOWA)
) SS:
SCOTT COUNTY)

On this 1st day of July, A.D., 1975, before me, the undersigned, a Notary Public in and for said County, personally appeared William C. Glynn and James W. Strick, each to me personally known, who being by me duly sworn did say that they are the Mayor and City Clerk, respectively, of said City of Bettendorf, a Municipal Corporation, of Scott County in the State of Iowa; that the seal affixed to the said instrument is the seal of said corporation by authority of its City Council; and the said William C. Glynn and James W. Strick each acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by each of them and by it voluntarily executed.

Margaret W. Lake
Notary Public in and for Scott County, Iowa

(Notarial Seal)

EXHIBIT B-4

CERTIFICATE OF COUNTY TREASURER:

I, Ken W. Gaines, Treasurer of Scott County, Iowa, hereby certify that the land laid out into a Planned Unit Development covered by the Plat hereto attached, known and designated as Block 2 of Quad City Technological Center to the City of Bettendorf, Iowa, is free from taxes payable to Scott County, Iowa except for special assessments for sewer and paving. Also 1974 tax as a lien, but not payable at this date.

Witness my hand this 1st day of July, A.D., 1975.

Ken W. Gaines, Treasurer

(Seal) By: M. L. Irwin, Deputy

CERTIFICATE OF ATTORNEY AT LAW:

I, Don D. Thuline, Attorney at Law, do hereby certify that I have examined the abstract of title to the land embraced in the attached plat and described in the accompanying certificate of Dale E. Christensen, registered land surveyor, and from such examination find that the City of Bettendorf, Iowa has good fee simple title to said real estate subject to a contract to Middle Road Investors, Inc. and that said land is free from encumbrances except for the sewer and paving assessments.

Dated at Bettendorf, Iowa this 1st day of July, A.D., 1975.

Don D. Thuline

CERTIFICATE OF COUNTY RECORDER:

I, Richard F. Hagen, Recorder of Scott County, Iowa, do hereby certify that the title in fee to the land covered by the plat hereto attached, known and designated as Block 2 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, is in the City of Bettendorf, Iowa and Middle Road Investors, Inc. and that said title is free from encumbrances.

EXHIBIT B-5

Witness my hand and seal of my office hereunto affixed this 1st day of July, A.D., 1975.

Richard F. Hagen, Recorder

(Seal) By: Leona M. Petersen, Deputy

CERTIFICATE OF CLERK OF DISTRICT COURT:

I, David H. Dahlin, Clerk of the District Court of the State of Iowa in and for Scott County, hereby certify that the land covered by the annexed plat known and designated as Block 2 of Quad City Technological Center, a Planned Unit Development, to the City of Bettendorf, Iowa, is free from all judgments, attachments, mechanic's liens, or other liens, as appears by the records of my office.

Witness my hand and the official seal of my office this 1st day of July, A.D., 1975.

David H. Dahlin, Clerk

(Seal) By: Marie W. Lemburg, Deputy

ACCEPTANCE BY CITY OF BETTENDORF, IOWA:

We, the undersigned, William C. Glynn, Mayor, and James W. Strieck, City Clerk of the City of Bettendorf, Iowa, do hereby certify that the following resolution was passed and adopted by the City Council of the City of Bettendorf, Iowa on the 1st day of July, A.D., 1975 and duly approved on the same day by the Mayor of said City:

RESOLUTION OF ACCEPTANCE
BY CITY OF BETTENDORF

Resolved by the City Council of the City of Bettendorf:

That the Final Plat of Block 2 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, as filed with the City Clerk of said City by Middle Road Investors, Inc. and the City of Bettendorf, Iowa be and the same is hereby approved and accepted; and that the Mayor and City Clerk be and they are hereby authorized and instructed to certify to the adoption of this resolution upon said plat as required by law.

EXHIBIT B-6

Witness our hands and the seal of the City of Bettendorf, Iowa, impressed hereon, this 1st day of July, A.D., 1975.

William C. Glynn
Mayor of the City of Bettendorf, Iowa

(Seal of City of Bettendorf, Iowa)

James W. Strieck
Clerk of the City of Bettendorf, Iowa

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No. 41.

MIDDLE ROAD INVESTORS, INC.,

To

CITY OF BETTENDORF, IOWA.

ASSESSMENT WAIVER.

Dated: July 1, 1975.
Ack'd: July 1, 1975.
Filed: July 18, 1975.
Rec'd: Doc.#11043-75.

Recites that Middle Road Investors, Inc., being the Subdivider and owner of all lots in a final plat for Block 2 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, which has this date bean filed with the Clerk of the City of Bettendorf, Iowa.

Recites that it is agreed by Middle Road Investors, Inc. that at such time as sidewalks or other conventional type of subdivision improvements are needed, the City of Bettendorf, Iowa shall put in said improvements and assess the cost of the same in the prescribed manner against the property comprising said Block 2 of Quad City Technological Center in accordance with the local requirements regarding special assessments.

Accordingly, Middle Road Investors, Inc. being the sole owner of Block 2 of Quad City Technological Center, a Planned Unit Develop-

EXHIBIT B-9

ment to the City of Bettendorf, Iowa, hereby waive all notices and rights of protest to the ordering of said improvements and assessing the cost thereof against the subdivided property even though the cost thereof may exceed the amount that can legally be assessed by the City of Bettendorf, Iowa, against the subdivided property and agree to be responsible for such differences and agree to permit the assessment of the entire cost of all of said improvements against the subdivided property. This waiver shall become null and void at the time the original division improvements are completed and accepted by the City.

Executed for Middle Road Investors, Inc. by Robert D. Danico, President and C. J. Munson, Secretary, with corporate seal affixed.

In the certificate of acknowledgment it is certified that said parties under oath stated that they are the President and Secretary, respectively, of Middle Road Investors, Inc., that the seal affixed is the corporate seal of said corporation; that they executed foregoing instrument as such officers in behalf of said corporation with authority of its Board of Directors as the voluntary act and deed of said corporation.

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EXHIBIT B-8

No. 42.

CITY OF BETTENDORF, IOWA,	)	ZONING ORDINANCE.
	)	
	)	Dated: Aug. 18, 1959.
To	)	Filed: Sept. 29, 1959.
	)	Rec'd: 127 Misc., 1.
	)	
THE PUBLIC.	)	

Ordinance adopted by the City Council of the City of Bettendorf, Iowa and approved by the Mayor repealing the Zoning Ordinance of the City of Bettendorf, Iowa, passed and approved July 2, 1957 as amended, and enacting a new Zoning Ordinance. According to the terms thereof, as amended by Ordinance dated February 2, 1971 and recorded on March 8, 1971 as Document #2527-71, records of the office of the Recorder of Scott County, Iowa, the real estate under examination is designated a "PUD" Planned Unit Development District.

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No. 43.

ABSTRACTERS' CERTIFICATE

Mortgages and Deeds of Trust dated twenty years or more prior to the date hereof, and all matters pertaining to the release or satisfaction thereof, have been omitted from this abstract unless the record shows that less than ten years have elapsed since the original or extended date of maturity of the secured indebtedness, or part thereof.

EXHIBIT B-1

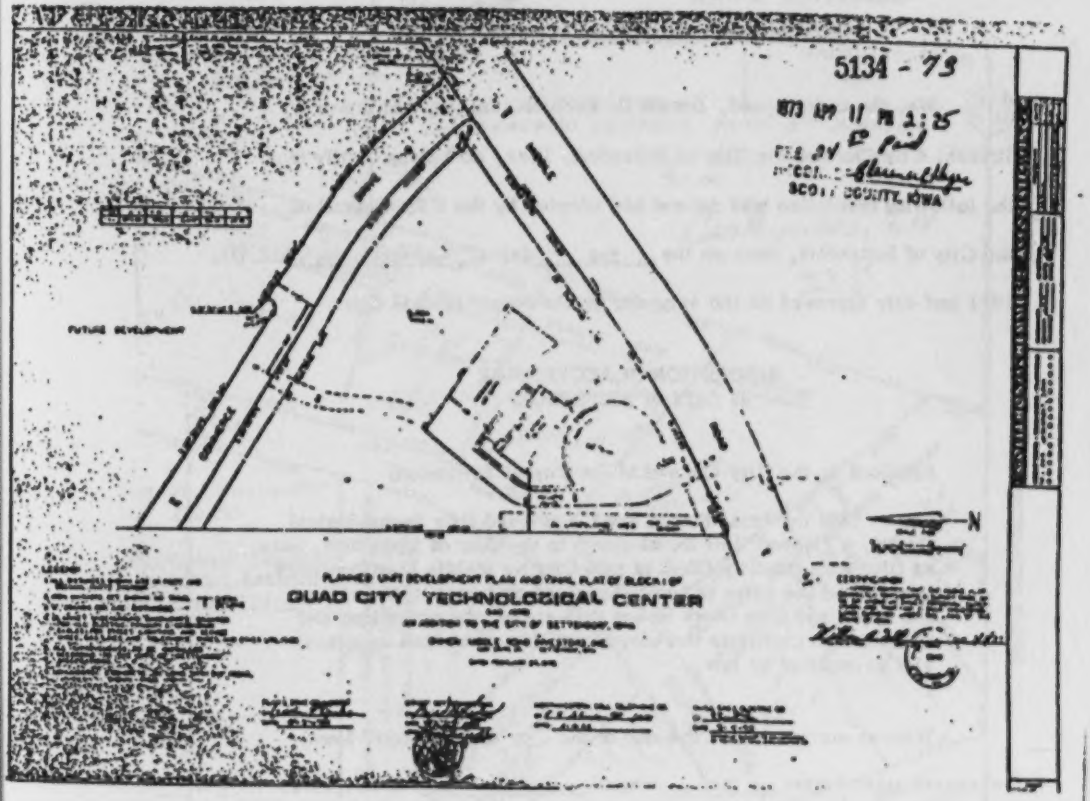


EXHIBIT C-1

ACCEPTANCE BY CITY OF BETTENDORF, IOWA

We, the undersigned, Donald D. Kucharo, Mayor, and James W. Strieck, City Clerk of the City of Bettendorf, Iowa, do hereby certify that the following resolution was passed and adopted by the City Council of the City of Bettendorf, Iowa on the 3rd day of April, A.D., 1973 and duly approved on the same day by the Mayor of said City:

RESOLUTION OF ACCEPTANCE
BY CITY OF BETTENDORF

Resolved by the City Council of the City of Bettendorf:

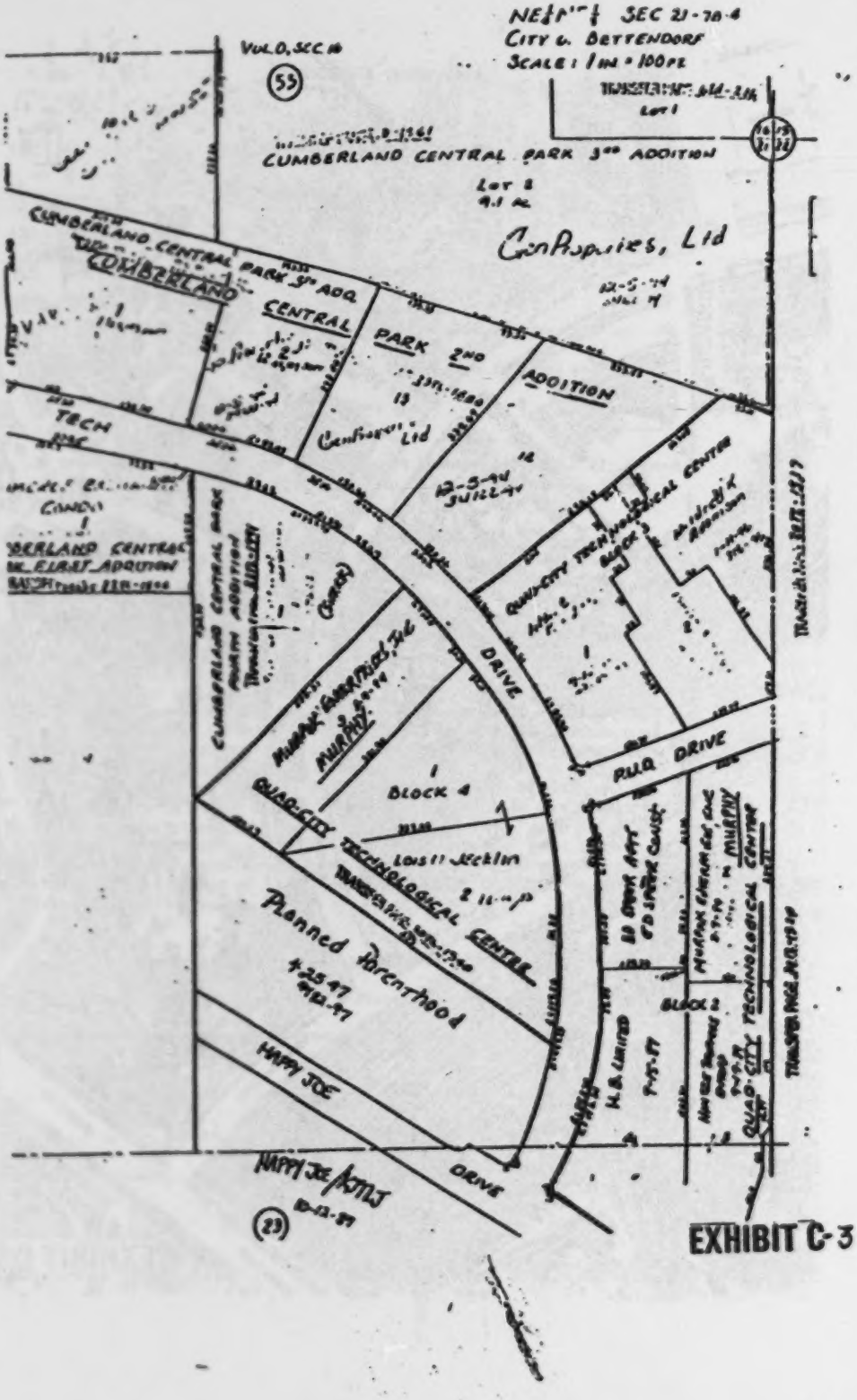
That the Final Plat of Block 1 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, as filed with the City Clerk of said City by Middle Road Investors, Inc. be and the same is hereby approved and accepted; and that the Mayor and City Clerk be and they are hereby authorized and instructed to certify to the adoption of this resolution upon said plat as required by law.

Witness our hands and the seal of the City of Bettendorf, Iowa, impressed hereon, this 3rd day of April, A.D., 1973.

Mayor of the City of Bettendorf, Iowa
Donald D. Kucharo

Clerk of the City of Bettendorf, Iowa
James W. Strieck

EXHIBIT C-2


NE¼ SEC 21-78-4
CITY OF BETTENDORF
SCALE: 1 IN = 100 FT
VOL. O, SEC 16
53
CUMBERLAND CENTRAL PARK 3RD ADDITION
LOT 2
9.1 AC
CumResources, Ltd
CUMBERLAND CENTRAL PARK 3RD ADD.
CUMBERLAND CENTRAL PARK 2ND ADDITION
TECH DRIVE
CumResources Ltd
QUAD-CITY TECHNOLOGICAL CENTER
CUMBERLAND CENTRAL PARK FIRST ADDITION
CUMBERLAND CENTRAL PARK FIRST ADDITION
PLUM DRIVE
BLOCK 4
QUAD-CITY TECHNOLOGICAL CENTER
Planned Parenthood
HAPPY JOE
HAPPY JOE ACRES
23
EXHIBIT C-3

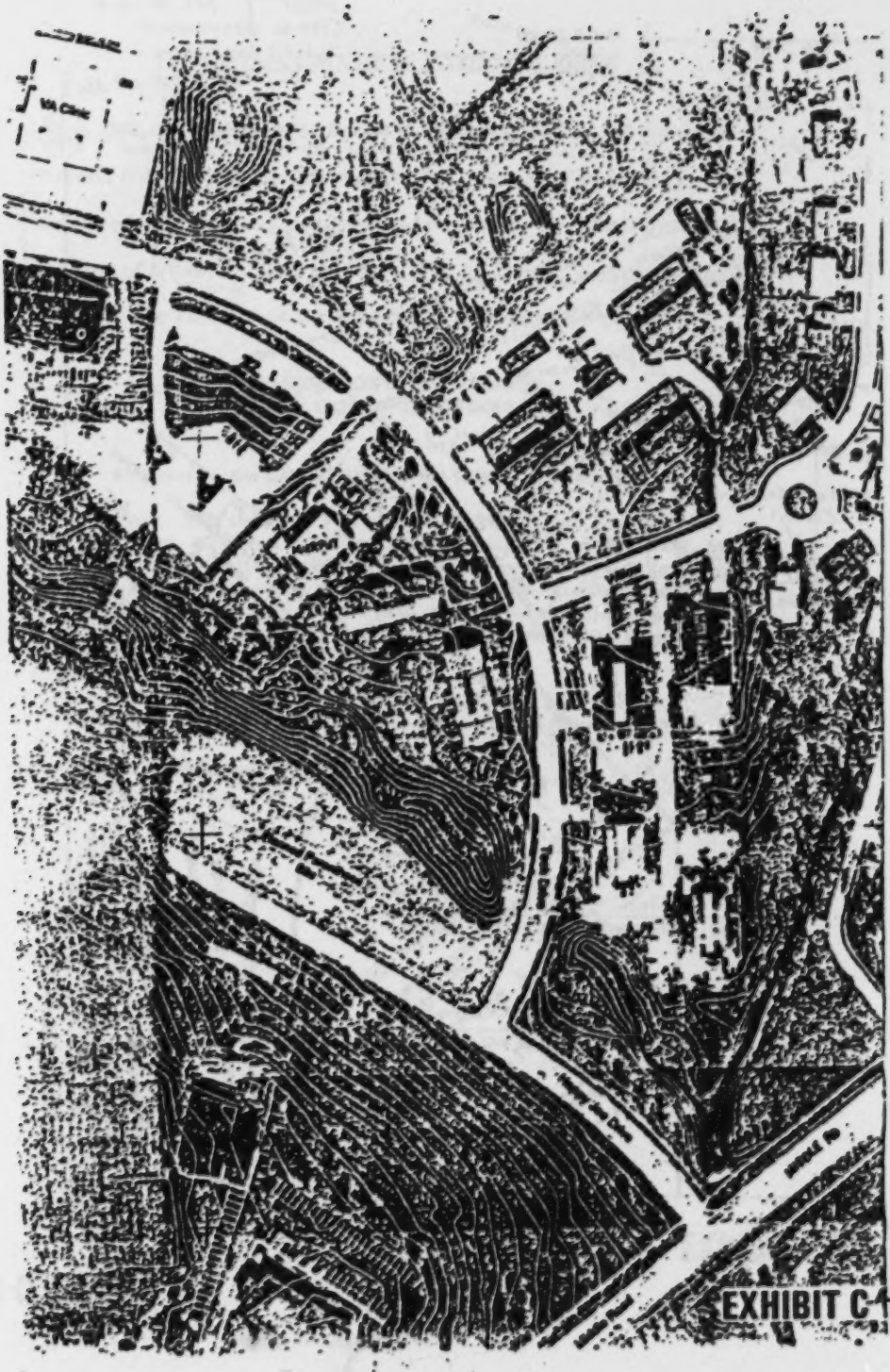


EXHIBIT C-1

SURVEYOR'S CERTIFICATE

TO

QUAD CITY TECHNOLOGICAL CENTER, INC.

A Planned Unit Development

to

THE CITY OF BETTENDORF, IOWA

I, William A. Fell, a Land Surveyor registered under the laws of the State of Iowa, do hereby certify that I have surveyed and laid out a tract of land described as follows:

A tract of land in part of the Northeast Quarter of Section 21, Township 78, North, Range 4 East of the 5th P.M., City of Bettendorf, Iowa, described as follows:

Commencing at the Northeast corner of the Northeast Quarter of said Section 21; thence South (assumed bearing) along the East line of the Northeast Quarter of said Section 21 a distance of 1564.93 feet; thence South 53°46'45" West along the Northerly Right of Way of Middle Road a distance of 85.0 feet to the point of beginning; thence continuing South 53°46'45" West along the Northerly Right of Way of Middle Road a distance of 430.89 feet to a point of curvature; thence Southwesterly along 1382.4 feet radius curve concave northerly a distance of 350.69 feet to a point of tangency; thence South 68°18'45" West a distance of 68.46 feet; thence North 08°06'19" East a distance of 931.66 feet; thence South 58°25'11" East a distance of 393.53 feet to a point of curvature; thence Northerly on a 15 foot radius curve concave westerly a distance of 23.56 feet to a point of tangency; thence North 31°34'49" East a distance of 3.00 feet; thence South 58°25'11" East a distance of 30.64 feet to a point of curvature; thence Southeasterly on a 919.43 feet radius curve concave Southwesterly a distance of 241.52 feet to a point of reverse curve; thence Easterly on a 15 foot radius curve concave Northerly a distance of 23.32 feet to the point of beginning containing 8.418 acres.

I further certify that the attached plat of Block 1 of Quad City Technological Center, Inc., a Planned Unit Development to the City of Bettendorf, Iowa correctly represents said survey and development.

Dated at Bettendorf, Iowa this 3rd day of April, 1971.

EXHIBIT D-1

CERTIFICATE OF ATTORNEY AT LAW:

I, Don Douglas Thuline, Attorney at Law, do hereby certify that I have examined the abstract of title to the land embraced in the attached plat and described in the accompanying certificate of William A. Fe[illegible], registered land surveyor, and from such examination find that Middle Road Investors, Inc. has good fee simple title to said real estate and that said land is free from encumbrances.

Dated at Bettendorf, Iowa, this 3rd day of April, A.D., 1973.

Don Douglas Thuline

ACCEPTANCE BY CITY OF BETTENDORF, IOWA:

We, the undersigned, Donald D. Kucharo, Mayor, and James W. Strieck, City Clerk of the City of Bettendorf, Iowa, do hereby certify that the following resolution was passed and adopted by the City Council of the City of Bettendorf, Iowa on the 3rd day of April, A.D., 1973 and duly approved on the same day by the Mayor of said City:

RESOLUTION OF ACCEPTANCE
BY CITY OF BETTENDORF

Resolved by the City Council of the City of Bettendorf:

That the Final Plat of Block 1 of Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, as filed with the City Clerk of said City by Middle Road Investors, Inc. be and the same is hereby approved and accepted; and that the Mayor and City Clerk be and they are hereby authorized and instructed to certify to the adoption of this resolution upon said plat as required by law.

Witness our hands and seal of the City of Bettendorf, Iowa, impressed hereon, this 3rd day of April, A.D., 1973.

Donald D. Kucharo
Mayor of the City of Bettendorf, Iowa

(Seal of City of Bettendorf, Iowa)

James W. Strieck
Clerk of the City of Bettendorf, Iowa

EXHIBIT D-2

RESTRICTIVE AND PROTECTIVE COVENANTS

MIDDLE ROAD INVESTORS, INC., an Iowa Corporation, hereby establish and declare the following restrictive and protective covenants to be applicable to the following described real estate located in Scott County, Iowa, to-wit: All lots in Blocks 1 through 6 of The Planned Unit Development known as Quad City Technological Research Center, to the City of Bettendorf, Iowa, which plat is recorded as Document No. 5134-73 in the office of the Recorder of Scott County, Iowa:

1. No building shall be erected, placed or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by a majority of the architectural contract committee hereinafter called the Committee as to the quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation. Said architectural contract committee shall consist of Two (2) Directors from the Subdivider, Middle Road Investors, and one additional member who shall be an owner or agent of an owner of a lot in said addition chosen by the majority of the lot owners. The Committee may refuse to approve such plans and specifications and lot plan if the building, structure or improvement to be made, constructed or installed in accordance therewith would not in the judgment of a majority of the Committee (a) comply in all respects with the conditions, limitations, reservations, restrictions and covenants herein set forth and be suitable for a use permitted by them, (b) be located on said lot so as to conform with the topography and finished ground elevation, to be as close to front building lines as necessary to attain reasonable uniformity of set-back in no case less than 30 feet with neighboring buildings and to provide for reasonably adequate rear yard

EXHIBIT D-3

case less than 25 feet and to be sufficiently far from side lot lines to provide reasonably adequate side yards, in no case less than ten feet in width, and (c) be constructed in such manner and of such materials and according to such external design as would promote the development of said Addition, of high quality and conform to the character of and harmonize architecturally with other buildings then existing on the numbered lots in said Addition.

Approval by the Committee of such building plans and specifications and lot plan shall not be required (1) if a majority of the Committee fail either to approve or disapprove such building plans and specifications and lot plan within thirty days after submission of the same to the Committee, or (2) in any event, and regardless of whether such plans, specifications and lot plan have been approved by the Committee and regardless of whether the same have been submitted to the Committee for approval if no suit to enjoin such erection, construction or installation has been commenced prior to the completion of construction as evidenced by the issuance and recordation of an occupancy permit by the Building Inspector of the City of Bettendorf, Iowa. Following completion of construction of said building upon any tract or parcel of property which constitutes a single building site, as evidenced by the issuance and recordation of an occupancy permit as hereinabove provided, the Committee shall have no further jurisdiction over any improvements constructed or erected upon said tract or parcel of property but the remainder of these covenants and restrictions shall remain in full force and effect.

2. No trailer, basement, tent, shack, or temporary structure shall be allowed upon any of said lots nor shall any trash, garbage, ashes or other refuse be thrown or dumped on any lot, however, that nothing herein shall be construed or prohibit storage on a

EXHIBIT D-4

reasonable time of such building materials as are necessary during and in connection with the construction of a building, structure, improvement, alteration or addition in accordance with the approval of the Architectural Committee, except as might be reasonably necessary for trash pickup by the City. There shall be no outside storage allowed in connection with any use of any lot in said addition and the title holder of each lot, vacant or improved, shall keep its lot or lots free of weeks, trash and debris.

3. No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the other lot owners in said addition.

4. The Subdivider shall grade and landscape the "common open space" area shown on the plat within a year following the approval of the Final Development Plan including the same; the lot owners of the numbered lots in such Quad City Technological Center shall maintain said "common open space".

5. The Subdivider shall install sidewalks in the "public walk easements" as shown on the plat at such time as the streets within each addition are constructed; the owners of lot or lots abutting said public walk easements" shall maintain said sidewalks.

6. The Subdivider shall landscape and, where designated, provide a planting screen in accordance with the applicable regulations of the Zoning Ordinance of the City of Bettendorf in the "landscaped areas" shown on the plat. The planting screen shall be installed within one year following the approval of the final planned unit development plan or before the occupancy of any lot in the addition whichever is sooner and the landscaping shall be installed on each lot prior to the occupancy of the lot(s) where said areas are located. The owners of lot or lots abuting said areas shall maintain said screen and/or landscaping.

EXHIBIT D-5

7. The Subdivider shall install street lights so that the light is reflected downward and all lot owners shall install all parking lot and building lights with the light reflecting downward and shielded such that no direct rays of light from the light source are transmitted into adjacent residence districts.

8. All signs shall be submitted to the Architectural Committee for approval and shall conform to the requirements of the sign ordinance of the City of Bettendorf, Iowa, in existance or as hereinafter amended.

9. No lot shall be subdivided or any portion thereof sold without the prior approval of the Architectural Committee.

10. There will be no loading or unloading of freight, trash or garbage between the hours of 9:00 P.M. and 6:00 A.M.

11. These restrictions shall be in force from the date of the Owner's Certificate to which it is an exhibit until January 1, 1993 or until such later date to which the same may be extended as hereinafter provided, and shall run with and be binding upon all lots in said addition, and every part thereof and shall be appurtenant to and for the benefit of all said lot owners. These restrictions shall be automatically extended for an additional ten-year period on January 1, 1993, and each ten year anniversary of said date unless a written instrument signed and acknowledged by the owners of a majority of all the lots in Quad City Technological Center shall prior to such date or anniversary be recorded with the Recorder of Scott County, Iowa, abrogating or modifying the same in whole or in part to the extent therein set forth. In determining the majority of said lot owners, each lot shall be entitled to one vote to be cast according to the will of a majority in interest of any co-owners having interest therein whether such majority is represented by a majority of the undivided interests in an entire lot or ownership of the greate

EXHIBIT D-6

of a subdivided lot. A contract purchaser or life tenant of the legal title shall be deemed the owner. In all other respects, ownership shall refer to record ownership of legal title.

11. Invalidity, abandonment or waiver of any one or more of these restrictions shall in no wise affect any of the other restrictions, which shall remain in full force and effect.

12. In the event any person who may at any time own or occupy any of the numbered lots, or part thereof, in said Addition should violate or threaten to violate any of these restrictions, said Middle Road Investors, Inc., its successors and assigns, and the owners from time to time of any of the numbered lots in said Quad City Technological Center shall have the right to proceed in any court of law or equity, by injunction or otherwise, to enforce performance and restrain violation, or pursue any other remedy to which it or they may be entitled and shall have the right to collect from the party or parties violating or threatening to violate the same, either jointly or severally, all damages, costs, expenses and counsel fees resulting from the violation thereof, or incurred in, or in connection with, said proceedings.

Dated at Bettendorf, Iowa this 3rd day of April, 1973.

Middle Road Investors, Inc.

By: Robert D. Danico
President

(Corporate Seal)

By: C. J. Munson
Secretary

STATE OF IOWA)
)
COUNTY OF SCOTT)

On this 3rd day of April, 1973, before me, the undersigned, a Notary Public in and for Scott County, Iowa, personally a

EXHIBIT D-7

Robert D. Danico, President, and C. J. Munson, Secretary, of Middle Road Investors, Inc., an Iowa Corporation, to me personally known, who being by me duly sworn, did say that they are respectively the President and Secretary of said corporation, that said corporation's seal is attached and that said instrument was signed and sealed on behalf of the said corporation by authority of its Board of Directors, and the said Robert D. Danico, President, and C. J. Munson, Secretary, severally acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it voluntarily executed.

(Notarial Seal)

Judith L. Moore
Notary Public in and for
Scott County, Iowa.

----- /////// -----

EXHIBIT D-8

CERTIFICATE OF COUNTY RECORDER

I, Clarence E. Hagen, Recorder of Scott County, Iowa, do hereby certify that the title in fee to the land covered by the plat hereto attached, known and designated as Block 1 of the Quad City Technological Center, a Planned Unit Development to the City of Bettendorf, Iowa, is in Middle Road Investors, Inc. and that said title is free from encumbrances.

Witness my hand and seal of my office hereunto affixed this 3rd day of April, A.D., 1973.

Clarence E. Hagen
Clarence E. Hagen, Recorder

By: _____
Deputy

CERTIFICATE OF CLERK OF DISTRICT COURT

I, David H. Dahlin, Clerk of the District Court of the State of Iowa in and for Scott County, hereby certify that the land covered by the annexed plat known and designated as Block 1 of Quad City Technological Center, a Planned Unit Development, to the City of Bettendorf, Iowa, is free from all judgments, attachments, mechanic's liens, or other liens, as appears by the records of my office.

Witness my hand and the official seal of my office this 3rd day of April, A.D., 1973.

_____
Clerk

EXHIBIT D-9

CERTIFICATE OF COUNTY TREASURER

I, Ken W. Gaines, Treasurer of Scott County, Iowa, hereby certify that the land laid out into a Planned Unit Development covered by the plat hereto attached, known and designated as Quad City Technological Center to the City of Bettendorf, Iowa, is free from taxes payable to Scott County, Iowa.

Witness my hand this 3rd day of April, A.D., 1973.

Ken W. Gaines
Ken W. Gaines Treasurer

By: M. L. Irwin
M.L. Irwin Deputy

CERTIFICATE OF ATTORNEY AT LAW

I, Don Douglas Thuline, Attorney at Law, do hereby certify that I have examined the abstract of title to the land embraced in the attached plat and described in the accompanying certificate of William A. Fell, registered land surveyor, and from such examination find that Middle Road Investors, Inc. has good fee simple title to said real estate and that said land is free from encumbrances.

Dated at Bettendorf, Iowa, this 3rd day of April, A.D., 1973.

Don T. Thuline

EXHIBIT D-10

CERTIFICATE AND DEDICATION OF OWNERS

This is to certify that the attached Plat of Block 1 of "Quad City Technological Center" a Planned Unit Development in and for the City of Bettendorf, Iowa, is hereby made with the free consent of Middle Road Investors, Inc. as owner and proprietor of the real estate described upon the foregoing and attached Plat and the Surveyor's Certificate thereto attached and certifies that said Plat is made in accordance with the desire of said proprietor and said proprietors do hereby dedicate to the use of the public any and all rights it may have in and to Commerce Drive as shown on the plat.

NOW THEREFORE, Middle Road Investors, Inc. hereby declares that the real property described in the surveyor's certificate is and shall be held, transferred, sold, conveyed and occupied subject to the restrictive and protective covenants.

IN WITNESS WHEREOF, Middle Road Investors, Inc. has caused this instrument to be executed by its President, attested to by its Secretary and its corporate seal attached hereto this 3rd day of April, A.D., 1973.

MIDDLE ROAD INVESTORS, INC.

By: _____
Robert D. Danico President

EXHIBIT D-11

1 of 6

IOWA STATE BAR ASSOCIATION
Official Form No. 7

10521-76

WARRANTY DEED

(CORPORATE)

1976 JUN 18 PM 4:11

Recording Fee $ 2.50
Transfer Fee $ 1.00

FEE $3.50 Paid
RECORDER

Know All Men by These Presents:

That CITY OF BETTENDORF, IOWA, A Municipal Corporation SCOTT COUNTY, IOWA

having its principal place of business at Bettendorf in Scott County and State of Iowa, a corporation organized and existing under the laws of Iowa, in consideration of the sum of One and no/100 $1.00 Dollar and other good and valuable consideration

in hand paid does hereby CONVEY unto MIDDLE ROAD INVESTORS, INC.

Grantees' Address

the following described real estate situated in Scott County, Iowa, to-wit:

A tract of land in Northeast Quarter of Section 21, Township 78 North, Range 4 East of the 5th P.M. in Bettendorf, Scott County, Iowa more particularly described as follows:

Commencing at the Northeast Corner of the Northeast Quarter of said Section 21; thence due South along the East line of the Northeast Quarter of said Section 21 a distance of 1384.53 feet to the Northerly R.O.W. of Middle Road; thence South 53° 45' 45" West along the Northerly R.O.W. of Middle Road a distance of 85.12 feet to a point of curvature; thence Westerly along a 15.00 foot radius curve concave Northerly a distance of 23.32 feet to a point of reverse curvature; thence Northwesterly along the Northerly R.O.W. of Commerce Drive and along a 919.45 foot radius curve concave Southwesterly a distance of 341.47 feet to a point of tangency; thence North 58° 25' 15" West along the Northerly R.O.W. of Commerce Drive a distance of 47.11 feet to the Point of Beginning; thence Southwesterly along the R.O.W. of Tech Drive and along a 497.75 foot radius curve concave Westerly a distance of 3.88 feet to a point of compound curvature; thence Westerly along a 15.00 foot radius curve concave Northwesterly a distance of 23.47 feet to a point of tangency; thence North 58° 25' 15" West along the Northerly R.O.W. of Commerce Drive a distance of 447.86 feet to a point on the Westerly Addition line; thence North 04° 06' 15" East a distance of 150.00 feet along the Westerly line of the Quad City Technological Center Addition; thence South 54° 10' 00" East a distance of 569.47 feet to a point on the Westerly R.O.W. of Tech Drive; thence Southwesterly along a 497.75 foot radius curve concave Westerly a distance of 47.38 feet to the POINT OF BEGINNING, containing 2.492 acres.

[illegible] Parcel B, [illegible] of the Contract between the parties hereto dated [illegible]

[illegible] and Covenants herein contained, the said party of the first part does hereby covenant with the said party of the second part, [illegible] that it has good and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever, except as may be above stated; and it covenants to warrant and defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, according to the context.

IN WITNESS WHEREOF said corporation has caused this instrument to be duly executed this 16th day of June, A.D. 19 76

The liens of special assessment for CITY OF BETTENDORF, IOWA the subdivision improvements mentioned in said contract are hereby released against the above described real estate with the liens to remain against the remaining property under said contract which has not been released. Also released against said real [illegible] the special assessments for Middle Road Sidewalks and Maplecrest Paving. This conveyance is exempt from the real estate transfer tax. Iowa Code 428A.2.

William C. Glynn, Mayor

James W. Brisch, City Clerk

Grantees' Address

STATE OF IOWA, SCOTT COUNTY, ss:

On this 16th day of May, A.D. 19 76, before me the undersigned, a Notary Public in and for said County and said State, personally appeared William C. Glynn and James W. Brisch, to me personally known, who being by me duly sworn, did say that they are the Mayor and City Clerk respectively of said corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and that the said William C. Glynn and James W. Brisch as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

ROBIN T. BUNGER, Notary Public in and for the said County and said State.

My Commission Expires [illegible]

EXHIBIT E

10530-76

FILED JUN 18 PM 4:12

WARRANTY DEED

CORPORATE

FEE $3.00 Paid
RECORDED Book 2 Page
SCOTT COUNTY, IOWA

Know All Men by These Presents:

That MIDDLE ROAD INVESTORS, INC.

having its principal place of business at Bettendorf in Scott County and State of Iowa, a corporation organized and existing under the laws of Iowa, in consideration of the sum of One and no/100 ($1.00) Dollar and other good and valuable consideration

the receipt of which is hereby acknowledged, does hereby CONVEY unto Robert H. Yerman and Rose Yerman, husband and wife, as tenants in common, and to their heirs and assigns,

Grantees' Address 2907 37th Street, Rock Island, Illinois 61201

the following described real estate situated in Scott County, Iowa, to-wit:

A tract of land in Northeast Quarter of Section 31, Township 78 North, Range 4 East of the 5th P.M., in Bettendorf, Scott County, Iowa more particularly described as follows: Commencing at the Northeast corner of the Northeast Quarter of said Section 31; thence due South along the East line of the Northeast Quarter of said Section 31 a distance of 1644.93 feet to the Northerly R.O.W. of Middle Road; thence South 53° 45' 45" West along the Northerly R.O.W. of Middle Road a distance of 80.12 feet to a point of curvature; thence Westerly along a 15.00 foot radius curve concave Northerly a distance of 23.32 feet to a point of reverse curvature; thence Northwesterly along the Northerly R.O.W. of Commerce Drive and along a 918.45 foot radius curve concave Southwesterly a distance of 348.07 feet to a point of tangency; thence North 59° 25' 12" West along the Northerly R.O.W. of Commerce Drive a distance of 47.11 feet to the Point of Beginning; thence Southwesterly along the R.O.W. of Tech Drive and along a 497.75 foot radius curve concave Westerly a distance of 2.00 feet to a point of compound curvature; thence Westerly along a 15.00 foot radius curve concave Northwesterly a distance of 23.47 feet to a point of tangency; thence North 59° 25' 12" West along the Northerly R.O.W. of Commerce Drive a distance of 447.06 feet to a point on the Westerly Addition line; thence North 00° 06' 10" East a distance of 230.06 feet along the Westerly line of the Quad City Technological Center Addition; thence South 34° 39' 09" East a distance of 569.47 feet to a point on the Westerly R.O.W. of Tech Drive; thence Southwesterly along a 497.75 foot radius curve concave Westerly a distance of 156.10 feet to the POINT OF BEGINNING, containing 3.492 acres. *

And said Corporation hereby covenants with said grantees, and successors in interest, that it holds said real estate by title in fee simple; that it has good and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever, except as may be above stated; and it covenants to warrant and defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

* Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, according to the context.

IN WITNESS WHEREOF said corporation has caused this instrument to be duly executed this 16th day of June, 19 76.

Subject to restrictive covenants MIDDLE ROAD INVESTORS, INC.
reserved in Doc. #3384-72; R.O.W. Agreement, Doc. #2-1-72; Right of Way Agreement, Doc. #2-1-72; Right of Way Agreement, Doc. #2-1-72; Right of Way

radius curve concave Northwesterly a distance of 23.47 feet to a point of tangency; ther North 58° 25' 11" West along the Northerly R.O.W. of Commerce Drive a distance of 44 feet to a point on the Westerly Addition line; thence North 00° 06' 19" East a distance of 250.00 feet along the Westerly line of the Quad City Technological Center Addition; ther South 54° 19' 09" East a distance of 569.47 feet to a point on the Westerly R.O.W. of T Drive; thence Southwesterly along a 497.75 foot radius curve concave Westerly a distan 156.18 feet to the POINT OF BEGINNING, containing 2.492 acres. *

And said Corporation hereby covenants with said grantees, and successors in interest, that it holds said real estate by title in fee simple; that it has good and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever, except as may be above stated; and it covenants to Warrant and Defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Words and phrases herein, including acknowledgement hereof, shall be construed as in the singular or plural number, according to the context.

IN WITNESS WHEREOF said corporation has caused this instrument to be duly executed this 16th day of June, 19 76.

~~Subject to restrictive covenants recorded as Doc. # 5134-73, S.C. Iowa Rec. Off. Subject to a drainage easement over the rear 35' and to an electrical easement over the Westerly 15' of said real estate.~~ Subject to a sanitary sewer easement 20 feet in width, the center line of which is 263.07 feet measured along the North line of Commerce Drive for the Southwest corner of said real estate, thence on a line running North 31°34' 50" East to the North line of said real estate.

MIDDLE ROAD INVESTORS, INC.

By Robert D. Danico President
Robert D. Danico Title

By C. J. Munson Secretary
C. J. Munson Title

1630 State Street

Bettendorf, Iowa 52722
(Grantors' Address)

STATE OF IOWA, SCOTT COUNTY, ss

On this 16th day of June A.D. 1976 before me, the undersigned, a Notary Public in and for said County and said State, personally appeared Robert D. Danico and C. J. Munson to me personally known, who, being by me duly sworn, did say that they are the President and Secretary respectively, of said corporation; that (no seal affixed thereto is the seal of said corporation) that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and that the said Robert D. Danico and C. J. Munson as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation by it and by them voluntarily executed.

Judith L. Moore Notary Public in and for said County and said State

R-6668 CORPORATE SEAL

EXHIBIT E

IOWA STATE BAR ASSOCIATION
Official Form No. 1.1

WARRANTY DEED

Know All Men by These Presents: That ROBERT H. VERSMAN and ROSE VERSMAN, husband and wife,

of the sum of ONE DOLLAR ($1.00) and other valuable consideration in consideration

in hand paid do hereby Convey unto the following individuals, an undivided 1/12 interest, in the real estate legally described on the attached Exhibit "A", which is made a part hereof by this reference thereto: KENNETH J. VERSMAN, LINDA JEAN VERSMAN, STUART J. HELLER, JUDITH LEE HELLER, FREDERICK J. GLASSMAN, and FRANCES BELLE GLASSMAN

Grantees' Address: See (*) below

the following described real estate, situated in Scott County, Iowa, to-wit:

(*) Kenneth J. and Linda Jean Versman
5144 South Jamaica Way
Englewood, CO 80111

Stuart J. and Judith Lee Heller
3235 South Gregg Court
Denver, CO 80210

Frederick J. and Frances Belle Glassman
17256 Luverne Place
Encino, CA 91316

25349-86

'86 DEC 31 PM 2:48

Fee $15.00 paid

SUBJECT TO: 1. Easements, covenants and restrictions of record.

Transfer Fee $ 5.00
Recording Fee $ 10.00

EXEMPT FROM IOWA TRANSFER TAX STAMPS BY VIRTUE OF IOWA CODE §428A.1. THERE IS NO CONSIDERATION FOR THIS CONVEYANCE

And the grantors do Hereby Covenant with the said grantees, and successors in interest, that said grantors hold said real estate by title in fee simple; that they have good and lawful authority to sell and convey the same; that said premises are Free and Clear of all Liens and Encumbrances Whatsoever except as may be above stated; and said grantors Covenant to Warrant and Defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the described premises.

Words and phrases herein including acknowledgment hereof shall be construed as in the singular or plural number, and as masculine or feminine gender, according to the context.

Signed this 23rd day of December 1986

Robert H. Versman
ROBERT H. VERSMAN

Rose Versman
ROSE VERSMAN

STATE OF ILLINOIS
ROCK ISLAND COUNTY, ss:

On this 23 day of December, 19 86, before me, the undersigned, a Notary Public in and for said State, personally

EXHIBIT F

WARRANTY DEED

Know All Men by These Presents: That ROBERT B. VERSMAN and ROSE VERSMAN, husband and wife, as Grantors,

of the first part, for and in consideration of the sum of ONE DOLLAR ($1.00) and other valuable considerations

in hand paid do hereby Convey unto EDWARD J. VERSMAN, LINDA JEAN VERSMAN, STUART J. BELLER, JUDITH LEE BELLER, FREDERICK J. CLAUSSEN, and FRANCES BELLE CLAUSSEN, each undivided 1/4 thereof as TENANTS IN COMMON, the following described real estate, situated in Scott County, Iowa, to-wit:

The legal description is attached hereto as Exhibit "A" and made a part hereof by this reference.

GRANTEES' ADDRESS: Kenneth J. and Linda Jean Versman
5144 South Jamaica Way
Englewood, CO 80111

Stuart J. and Judith Lee Beller
1235 South Gropp Court
Denver, CO 80219

Frederick J. and Frances Belle Claussen
17756 Lorraine Place
Encino, CA 91316

1735-87

EST JAN 28 PM 3:00

$11.00 Paid

RECORDER'S
BOOK PAGE

Transfer Fee $.50

Recording Fee $5.00

SUBJECT TO: Easements, covenants and restrictions of record.

EXEMPT FROM IOWA TRANSFER TAX STAMPS BY VIRTUE OF IOWA CODE SECTION 428.1. THERE IS NO CONSIDERATION FOR THIS CONVEYANCE.

This Warranty Deed confirms the deed executed by the Grantors on December 23, 1986, recorded in the Scott County Recorder's office as Document No. 25343-86, and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit "A" hereto.

And the grantors do hereby Covenant with the said grantees, and successors in interest, that said grantors hold said real estate by title in fee simple; that they have good and lawful authority to sell and convey the same; that said premises are free and Clear of all Liens and Incumbrances, Whatsoever, except as herein stated; and said grantors Covenant to Warrant and Defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the described premises.

Words and phrases herein, including acknowledgement hereof, shall be construed as in the singular or plural number, and as masculine or feminine gender according to the context.

Dated this 24th day of December, 1986.

Robert B. Versman
ROBERT B. VERSMAN

Rose Versman
ROSE VERSMAN

STATE OF ILLINOIS
ROCK ISLAND COUNTY, ss:

On this 24th day of December, 1986, before me, the undersigned, a Notary Public, in and for said State, personally appeared ROBERT B. VERSMAN and ROSE VERSMAN, husband and wife

to me known to be the identical persons named in and who executed the foregoing instrument and acknowledged that they executed the same as their voluntary act and deed.

1360 Kimberly Ridge Road
Bettendorf, IA 52722

Ellen K. Peete
Ellen K. Peete
Notary Public in and for the State of Illinois

EXHIBIT G

IOWA STATE BAR ASSOCIATION — FOR THE LEGAL EFFECT OF THE USE OF THIS FORM, CONSULT YOUR LAWYER

WARRANTY DEED

Know All Men by These Presents: That ROBERT H. VERSMAN and ROSE VERSMAN, husband and wife, as Grantors,

in consideration of the sum of ONE DOLLAR ($1.00) and other valuable considerations in hand paid do hereby Convey unto KENNETH J. VERSMAN, LINDA JEAN VERSMAN, STUART J. HELLER, JUDITH LEE HELLER, FREDERICK J. GLASSMAN, and FRANCES BELLE GLASSMAN, each receiving an undivided one-twelfth interest, for a total conveyance of one-half of

Grantees, husband and wife

the following described real estate, situated in Scott County, Iowa:

The legal description is attached hereto as Exhibit "A" and made a part hereof by this reference.

1735-87

FILED JAN 28 PM 3 01

GRANTEES' ADDRESS: Kenneth J. and Linda Jean Versman
5144 South Jamaica Way
Englewood, CO 80111

Stuart J. and Judith Lee Heller
3235 South Gregg Court
Denver, CO 80210

Frederick J. and Frances Belle Glassman
17256 Laverne Place
Encino, CA 91316

SUBJECT TO: Easements, covenants and restrictions of record.

EXEMPT FROM IOWA TRANSFER TAX STAMPS BY VIRTUE OF IOWA CODE SECTION 428A.1. THERE IS NO CONSIDERATION FOR THIS CONVEYANCE.

This Warranty Deed confirms the deed executed by the Grantors on January 2, 1987, recorded in the Scott County Recorder's office as Document No. 165-87, and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit "A" hereto.

And the grantors do Hereby Covenant with the said grantees, and successors in interest, that said grantors hold said real estate by title in fee simple; that they have good and lawful authority to sell and convey the same; that said premises are Free and Clear of all Liens and Encumbrances Whatsoever except as may be above stated; and said grantors Covenant to Warrant and Defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the described premises.

Words and phrases herein including acknowledgment hereof shall be construed as in the singular or plural number, and as masculine or feminine gender according to the context.

Signed this 3rd day of January, 1987.

STATE OF ILLINOIS,
ROCK ISLAND COUNTY, ss:

On the 3rd day of January, 1987, before me, the undersigned, a Notary Public in and for said State, personally appeared ROBERT H. VERSMAN and ROSE VERSMAN, husband and wife.

Robert H. Versman
ROBERT H. VERSMAN

Rose Versman
ROSE VERSMAN

1360 Kimberly Ridge Road
Bettendorf, IA 52722

EXHIBIT H

EXHIBIT A

A tract of land in Northeast quarter of Section 21, Township 78 North, Range 4 East of the 5th P.M. in Bettendorf, Scott County, Iowa more particularly described as follows: Commencing at the Northeast Corner of the Northeast Quarter of said Section 21; thence due South along the East line of the Northeast Quarter of said Section 21 a distance of 1564.93 feet to the Northerly R.O.W. of Middle Road; thence South 53° 44' 45" West along the Northerly R.O.W. of Middle Road a distance of 85.32 feet to a point of curvature; thence Westerly along a 15.00 foot radius curve concave Northerly a distance of 23.32 feet to a point of reverse curvature; thence Northwesterly along the Northerly R.O.W. of Commerce Drive and along a 919.45 foot radius curve concave Southwesterly a distance of 341.47 feet to a point of tangency; thence North 58° 25' 11" West along the Northerly R.O.W. of Commerce Drive a distance of 47.11 feet to the Point of Beginning; thence Southwesterly along the R.O.W. of Tech Drive and along a 497.75 foot radius curve concave Westerly a distance of 3.00 feet to a point of compound curvature; thence Westerly along a 15.00 foot radius curve concave Northwesterly a distance of 23.47 feet to a point of tangency; thence North 58° 25' 11" West along the Northerly R.O.W. of Commerce Drive a distance of 447.09 feet to a point on the Westerly Additlon line; thence North 00° 06' 19" East a distance of 250.00 feet along the Westerly line of the Quad City Technological Center Addition; thence South 54° 19' 09" East a distance of 569.47 feet to a point on the Westerly R.O.W. of Tech Drive; thence Southwesterly along a 497.75 foot radius curve concave Westerly a distance of 156.18 feet to the POINT OF BEGINNING, containing 2.492 acres, subject to a sanitary sewer easement 30 feet in width, the center line of which is 263.07 feet measured along the North line of Commerce Drive for the Southwest corner of said real estate, thence on a line running North 31° 24' 50" East to the North line of said real estate. Subject to easements, covenants and restrictions of record.

ALSO DESCRIBED AS FOLLOWS:

PART OF THE EAST HALF OF THE NORTHEAST QUARTER OF SECTION 21 TOWNSHIP 78 NORTH, RANGE 4 EAST OF THE 5TH PRINCIPAL MERIDIAN IN SCOTT COUNTY IOWA.

COMMENCING AT THE NORTHEAST CORNER OF THE NORTHEAST QUARTER OF SAID SECTION 21. THENCE SOUTH 00°0'00" EAST, A DISTANCE OF 744.06 FEET TO THE NORTH RIGHT-OF-WAY FOR P.V.D. DRIVE (52'R.O.W.); THENCE SOUTH 71°25'13" WEST ALONG SAID RIGHT-OF-WAY, A DISTANCE OF 291.00 FEET; THENCE 22.30 FEET ALONG A CURVE CONCAVE NORTHEASTERLY WITH A RADIUS OF 15.00 FEET, A CHORD BEARING NORTH 65°59'29" WEST, AND A CHORD DISTANCE OF 20.30 FEET TO THE EAST RIGHT-OF-WAY FOR TECH DRIVE (52'R.O.W.); THENCE SOUTH 64°37'48" WEST, A DISTANCE OF 52.00 FEET TO THE WEST RIGHT-OF-WAY OF TECH DRIVE; THENCE ALONG THE WEST RIGHT-OF-WAY THE FOLLOWING THREE COURSES: THENCE 172.94 FEET ALONG A CURVE CONCAVE SOUTHWESTERLY WITH A RADIUS OF 424.00 FEET, A CHORD BEARING SOUTH 11°41'05" EAST, AND A CHORD DISTANCE OF 171.74 FEET; THENCE SOUTH 00°00'00" WEST, A DISTANCE OF 61.38 FEET; THENCE 117.36 FEET ALONG A CURVE CONCAVE SOUTHWESTERLY WITH A RADIUS OF 497.75 FEET, A CHORD BEARING SOUTH 06°44'59" WEST, AND A CHORD DISTANCE OF 116.99 FEET TO THE POINT OF BEGINNING THENCE 160.18 FEET ALONG A CURVE CONCAVE NORTHWESTERLY WITH A RADIUS OF 497.75 FEET, A CHORD BEARING SOUTH 22°43'05" WEST, AND A CHORD DISTANCE OF 159.49 FEET; THENCE 23.47 FEET ALONG A CURVE CONCAVE NORTHWESTERLY WITH A RADIUS OF 15.00 FEET, A CHORD BEARING OF SOUTH 76°45'32" WEST, AND A CHORD DISTANCE OF 21.15 FEET TO THE NORTH RIGHT-OF-WAY OF COMMERCE DRIVE (52'R.O.W.); THENCE ALONG SAID RIGHT-OF-WAY NORTH 58°25'11" WEST, A DISTANCE OF 447.09 FEET; THENCE NORTH 00°06'19" EAST, A DISTANCE OF 250.00 FEET; THENCE SOUTH 54°19'09" EAST, A DISTANCE OF 569.39 FEET TO THE POINT OF BEGINNING CONTAINING 2.26 ACRES (98,446 S.F.) MORE OR LESS AND SUBJECT TO ANY EASEMENTS OF RECORD.

EXHIBIT I

REAL ESTATE TRANSFER TAX PAID 277
STAMPS
319.20
RECORDER
4-24-97
DATE
COUNTY

09482-97
97 APR 24 PM 12:15
REC'D 2100 mil
RECORDER OF DEEDS
SCOTT COUNTY, IOWA

Transfer Fee $ 5.00
Recording Fee $ 11.00

Addition
KH

Prepared by Richard F. Tramble, 2307 Spruce Hills Drive, Bettendorf, IA 52722 319-359-3648

WARRANTY DEED

For the consideration of One Dollar ($1.00) and Other Valuable Consideration, KENNETH J. VERSHAW AND LINDA JEAN VERSHAW, Husband and Wife, STUART J. KELLER AND JUDITH LEE KELLER, Husband and Wife, and FREDERICK J. GLASSMAN AND FRANCES BELLE GLASSMAN, Husband and Wife, do hereby Convey to Planned Parenthood of Greater Iowa, Inc. or Planned Parenthood of Greater Iowa Foundation, Inc., the following described real estate in Scott County, Iowa:

See attached Exhibit A.

And the Grantors do Hereby Covenant with the said grantees, and successors in interest, that said grantors hold said real estate by title in fee simple; that they have good and lawful authority to sell and convey the same; that said premises are Free and Clear of all Liens and Encumbrances Whatsoever except as may be above stated; and said grantors Covenant to Warrant and Defend the said premises against the lawful claims of all persons whomsoever, except as may be above stated.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the above described premises.

Words and phrases herein, including acknowledgment hereof, shall be construed as in the singular or plural number, and as masculine or feminine gender, according to the context.

Dated this 14th day of April, 1997.

KENNETH J. VERSHAW

LINDA JEAN VERSHAW

STUART J. KELLER

JUDITH LEE KELLER

FREDERICK J. GLASSMAN

FRANCES BELLE GLASSMAN

FRI APR 25 1997

EXHIBIT I

APPENDIX C

LAW ENFORCEMENT *MEMORANDUM* OF AMICUS CURIAE JAMES J. CLANCY, DATED NOVEMBER 24, 1999, DOCUMENTING PAST HISTORICAL EVENTS, DISASTROUS RESULTS, CONFUSION AND SERIOUS DETRIMENT SUFFERED BY THE GENERAL PUBLIC AS A RESULT OF THE INTERFERENCE OF THE FEDERAL COURTS WITH THE 10TH AND 11TH AMENDMENT SOVEREIGN POWER OF THE INDIVIDUAL STATES TO REGULATE THE COMMERCIAL SALE, DISTRIBUTION, ETC., OF HARD-CORE PORNOGRAPHY BY CLOSURE OF THE PREMISES AS A COMMON LAW PUBLIC NUISANCE, AS EXEMPLIFIED BY THE U.S. SUPREME COURT'S DECISION IN *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592, 43 L.ED.2D 482, 95 S.CT. 1200 (1975), REH. DEN., 421 U.S. 971, 44 L.ED.2D 463, 95 S.CT. 1969.

(Reference: *Brief Amicus Curiae of James J. Clancy, etc.*, ... Page 15, line 29.)

The Law Office Of James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

(818) 352-2069
FAX (818) 352-6549

November 24, 1999

MEMORANDUM

SUBJECT:

1. ***Los Angeles Times*** news article, dated September 1, 1999, with headline reading "L.A. Economy's Dirty Secret: Porn Is Thriving"; and

2. Mayor Richard Reardon's response to the press that he "wishes the industry was headquartered somewhere else" and that he is "ashamed of the porno industry".

3. **(a)** The use of Orange County Superior Court Exhibits (records) in the form of autoptical proferences (time and motion studies of pornographic films to establish visual proof of Justice Potter Stewart's "phenomenon" [1] that one knows hard-core pornography when he sees it), and **(b)** the use of 11 years of public nuisance abatement adjudications in Santa Ana (1975-1986) (pursuant to which such pornographic films were declared to be hard-core pornography and enjoined by Order of Court) to prove, by example and similitude, the existence of identical moral public nuisances and unlawful business practices in the San Fernando Valley, ***(Excised Line)***.

---

[1] Phenomenon is defined in Webster's Collegiate Dictionary, 5TH Edition, as "any object known through the senses rather than thought or intuition; specifically with Kant, the object of experience.

4. My contention that "closure" is mandated where the visual evidence which is offered is in the form of autoptical proferences; i.e., time and motion studies of films which provide irrefutable proof of hard-core pornography as the sole stock in trade, which is both a common law public nuisance under ***People ex rel. Busch v. Projection Room Theater***, 16 Cal.3d 350 [Mar. 4, 1976], as modified in 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 [June 1, 1976] and a statutory unlawful business practice under **Business and Profession Code §17200** and ***People v. E.W.A.P., Inc.***, 106 Cal.App.3d 315, 165 Cal.Rptr. 73 (CA2, dv5, 5-29-80) (hearing denied by Cal. Sup. Ct. on Aug. 21, 1980) which can be terminated by a lawsuit brought "by any person acting for the interests of itself, its members or the general public" (my emphasis). **Business and Professions Code §17.204**.

Pursuant to our phone conversation on October 28, 1999, I am personally delivering this Memorandum with its supporting documents, which will corroborate my representations in our September 1, 1999 and October 28, 1999 phone conversations that the present operations of the producers and distributers of "Porno" films and videotapes in the San Fernando Valley can be stopped through legal process.

Both the September 1, 1999 ***Los Angeles Times*** news article (see copy at **Exhibit A** to this Memorandum) and Mayor Reardon's remarks acknowledge that the production and distribution of obscene motion picture films and videotapes is rampant in the City of Los Angeles. The Mayor's remarks imply that there is nothing that the Mayor can do to stop that activity. I do not agree. The Orange County Superior Court records as to the number of injunctions which were issued in 11 years of Public Nuisance Abatement litigation, establish that the contrary proposition is true.

Upon reading the September 1, 1999 ***Los Angeles Times*** news article, I immediately picked up the phone and called to see if it would be possible for you to "access" the Mayor and alert him to the facts **(1)** that he has not been fully advised; and **(2)** that the production and distribution of such pornographic films can be stopped by the use of legal process by any person, pursuant to the **Business and Professions Code**. I stated that if a foundation grant were made available for such purposes, I could, within a relatively short period, prepare and submit a comprehensive study and report ***(Excised Line)*** based upon my 11 years of personal experiences with litigation in Santa Ana, with full documentation by way of autoptical proferences; that is, time and motion studies", which would establish: **(1)** that the production and distribution of such pornographic films and videotapes, identical to those in the litigation in Santa Ana, is both an unlawful business practice and a public nuisance in Los Angeles, and **(2)** that such unlawful business can now be closed down by an Equity Decree under the **Federal Constitution** pursuant to the **11TH Amendment** Sovereign Powers of State Judiciaries to act upon important State matters, and that the proposed Study would outline the steps that need to be taken in the Courtroom to achieve that objective.

(Excised Paragraphs [2][suggested remedy]).

As background, I performed legal services for the City Council of Santa Ana during the 11 year period 1975-1986 in a monumental effort by the City of Santa Ana to close the Mitchell Brothers' Santa Ana Theatre in Honer Plaza (formerly a United Artist's Family Theater) as a moral public nuisance. Unfortunately, at that time, the membership of the U.S. Supreme Court was badly "fragmented" and it was impossible to get the members of the High Court to note jurisdiction and rule on the constitutionality of the "closure" issue. I believe that had we been able to "force" a ruling out of the U.S. Supreme Court, we would have been able to achieve

our Orange County objective in Santa Ana and close the Theatre, based upon past illegal conduct, and the problems that exist today would not have developed.

In the interim 13 years, the balance of power on the High Court has shifted, and that objective can now be achieved, due to the new interpretation recently given to the **11TH Amendment** powers by a majority of five members on the present Court (Rhenquist, Kennedy, Scalia, Thomas and O'Connor) regarding "state sovereignty" and the subject matter jurisdiction of the state judiciary as to important state matters pursuant to the **11TH Amendment**. The recent interest in the **11TH Amendment** as a viable theory regarding state power, gives states new latitude in crafting, and implementing innovative solutions to state law enforcement problems.

In the first four years, (Sep. 1975 - Jun. 21, 1979) of our eleven year Santa Ana operations (1975-1986), the City of Santa Ana surveilled two pornographic films each week and did a comprehensive analysis of the same by the construction of "time and motion studies" and "continuities", as evidence in the form of "autoptical proferences". A list of those films which were named in four public nuisance abatement lawsuits is enclosed with this memo as an appendix to my Status Report to the Santa Ana City Attorney, dated October 28, 1982. See, also, my Status Report to the Santa Ana City Attorney, dated March 24, 1980, at page 5, which identifies four public nuisance abatement lawsuits and the number of pornographic films in each lawsuit as follows:

Lawsuit	Case No.	Period Covered
(Gow I)	25-65-30	October 1975 -
	(filed Nov. 2, 1976)	April 13, 1977
		(24 Programs, 48 films)

Lawsuit	Case No.	Period Covered
(Gow II)	28-12-14 (filed Dec. 20, 1977)	April 13, 1977 - October 19, 1977 (12 Programs, 24 films)
(Gow III)	29-91-83 (filed Oct. 3, 1978)	July 15, 1978 - November 2, 1978 (13 Programs, 26 films)
(Gow IV)	31-55-93 (filed June 21, 1979)	November 2, 1978 - January, 1979 and April, 1979 - August, 1979 (23 Programs, 42 films)

144 Films

The Courtroom litigation during the period 1976-1979 described above involved the defense of one Federal copyright and one Federal Civil Rights lawsuit, and the prosecution of four State Court Public Nuisance Abatement lawsuits in which all 144 pornographic films were adjudicated at hearings on Motions for Preliminary Injunction, to be hard-core pornography and enjoined by the Orange County Superior Court as Common Law Public Nuisances, in violation of the California Obscenity Statutes. Those Superior Court deliberations were affirmed by the Court of Appeal and review was denied by the California Supreme Court. To this date, those adjudications have not been reversed. See, in this regard, the two bound volumes which are enclosed containing copies of the following Eight (8) Status Reports to the Santa Ana City Attorney dated:

April 24, 1979; December 14, 1979; March 24, 1980; May 12, 1980; December 12, 1980; December 31, 1981; October 28, 1982; and June 23, 1986; and other letters.

Thirteen (13) years later, resistance to the dissemination

of such hard-core pornographic videotapes has virtually collapsed. I am enclosing a copy of a pornographic publication (3/4" thick, containing 350 pages), which is published every January and distributed by the Porno Industry in Los Angeles and elsewhere in the U.S., under the title "Adult Video News" (A.V.N.) and "Adult Entertainment Guide", "broadcasting" the hard-core pornographic film titles which are now available in Los Angeles, the identity of the L.A. Producers, and Distributors of such pornographic films, the names of the actors and actresses and the nature of the hard-core pornographic content.

The remarkable part of this change in law enforcement efforts is that almost everyone of the pornographic films which were surveilled in Santa Ana during that 11-year period is named in the A.V.N. Adult Entertainment Guide. See and compare, in this regard, the titles listed in my Status Report to the Santa Ana City Attorney, dated October 28, 1982 (at "Appendix H"), and pages 204-207 of the A.V.N. Adult Entertainment Guide, listing the video titles of the hard-core pornographic "classics" which are available, with a check mark as to those titles which were exhibited and surveilled at the Mitchell Brothers' Theatre during the period October, 1975 - August, 1979 (see copy at **Exhibit B** to this Memorandum), which were the subjects of the Public Nuisance Abatement lawsuits known as Gow I, Gow II, Gow III and Gow IV and enjoined by the Orange County Superior Court as unlawful hard-core pornography, and upheld by the California Court of Appeal and California Supreme Court !

The magazine itself is pornographic. Further, all of the pornographic films listed therein which were held to be hard-core pornography by the Orange County Superior Court are products of an unlawful business practice and subject to abatement in Los Angeles County as public nuisances as a matter of law. To reach this conclusion, ***(Excised Words)*** need only examine the "autoptical proference" (time and motion

study) for each of such films which is under challenge. The City of Santa Ana would not have been able to continue to maintain such lawsuits in the California Courts for 11 successive years without the "time and motion" studies to rely upon, and keep the City of Santa Ana in the courtroom. Such "autoptical proferences" are irrefutable.

I am transmitting two bound volumes of my correspondence and status reports to the Santa Ana City Attorney for the year 1979 and the years 1980 through 1986, on the progress of the Santa Ana lawsuits, containing my analysis of (1) the results achieved in the State and Federal Courts as to each of the above pornographic films and videotapes; (2) the nuisance abatement process (which was upheld by the California Supreme Court in ***People ex rel. Busch v. Projection Room Theater***, supra) (see copy at **Exhibit C** to this Memorandum); (3) the use of that process by seven other States (Washington, Ohio, Idaho, Georgia, Alabama, Texas and North Carolina); and (4) the news accounts of the closing down of the Exxxtasy and Tuxedo Channels on Satellite T.V. by Montgomery, Alabama District Attorney Jimmy Evans in December, 1990, using the "time and motion" and "continuity" studies which our operations prepared in Los Angeles with respect to the pornographic films (which included "The Opening of Misty Beethoven") which were exhibited by the Exxxtasy and Tuxedo Channels via Satellite and broadcast to Montgomery, Alabama and Los Angeles, California, simultaneously (see copy of the correspondence and news accounts of the demise of the Exxxtasy and Tuxedo Channels at **Exhibit D** to this Memorandum).

Each of the pornographic films which were named in those Santa Ana lawsuits was supported by a "time and motion study" which was examined by the City Council Members prior to their voting to authorize a public nuisance abatement lawsuit to be filed on such films. See my letter to the City Attorney, dated May 11, 1979. This was the "key" to our success in the

Courtroom. The use of the "time and motion study", as autoptical evidence ("I know it when I see it" "phenomenon"—with no need to apply a definition and the "reasoning" mind) precluded the Mitchell Brothers from making the obscenity definition an issue or turning the lawsuit into a semantical debate. The Mitchell Brothers candidly admitted in their depositions that they produced and exhibited only hard-core pornography. It would have been impossible for them to argue a plausible contrary proposition or come to a plausible contrary conclusion. For obvious reasons, no injunction was sought by the City of Santa Ana prior to a judicial determination on the merits.

Regretfully, on November 30, 1981, the U.S. Supreme Court refused to grant a hearing on the "closure" issue we had drawn in our primary lawsuit (Gow I). That issue was squarely before the High Court twice on the Santa Ana City ***Petitions for a Writ of Certiorari*** in Case No. 81-271 and Case No. 82-345 (see copy of "Reasons for Granting Review" in 82-345 at **Exhibit E** to this Memorandum). It took that long (5 years) to frame the "closure" issue at trial and get Case No. 81-271 before the High Court on appeal. We did this by getting the Trial Judge to make a finding of fact that he would have closed down the Theatre because of the contents being exhibited (which he described in detail) if the Constitution permitted him to do so under the U.S. Supreme Court decisions. See Status Reports, dated December 31, 1981, at pages 3-4, and October 28, 1982 at pages 1-2. Instead of ruling on the "closure" issue in Case No. 81-271, the U.S. Supreme Court reversed on the burden of proof issue summarily and without briefing or oral arguments, holding that in a civil case, the Equity"clear and convincing" burden of proof was satisfactory, and that the criminal standard of "beyond a reasonable doubt" was not applicable. This posed a real problem for Santa Ana, because the California Supreme Court in ***People ex rel. Busch v. Projection Room Theater***, supra, had refused to consider the "closure" issue on appeal, absent a decision from the U.S.

Supreme Court on the "closure" issue. See Associate Justice Clark, concurring and dissenting in ***People ex rel Busch***, 17 Cal.3d 42 at page 62 (see copy of the ***Busch*** decision at **Exhibit C** to this Memorandum).

In the meantime, a coordinated effort was made to get the "closure" issue before the High Court in one of the seven other State cases, which were pursuing the same remedy (Washington, Ohio, Idaho, Georgia, Alabama, Texas and North Carolina). Those efforts were also unsuccessful.

In ***State of Idaho, ex rel. Kidwell, Attorney General and Leroy, Ada County Prosecuting Attorney v. U.S. Marketing, Inc., et al.***, ___ Idaho ___, 631 P.2d 622 (March 29, 1981), the Idaho Supreme Court reversed the trial court and held that closure was constitutional and authorized the award of attorney fees (see copy of ***State of Idaho, ex rel. Kidwell and Leroy*** at **Exhibit C** to this Memorandum). Upon appeal, the U.S. Supreme Court first noted jurisdiction of those issues, and then vacated that ruling when ***U.S. Marketing, Inc, et al.*** withdrew its appeal voluntarily so as not to have the High Court rule on and uphold the closure issue. ***U.S. Marketing, Inc, et al.*** was ordered to do so by the suppliers who did not want a ruling on that issue. See Status Report, dated December 31, 1981. See also, pages 32-65 at page 36 of the ***Petition for Writ of Certiorari*** in ***Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theatre, et al.***, No. 82-345, October Term, 1982, which is attached to this Memorandum as **Exhibit E**.

The State case (on lack of subject matter jurisdiction) that came closest to solving Santa Ana's problem with the closure issue (***Carol Vance, et al. v. Universal Amusement Company, Inc., et al.***, No. 78-1588, U.S. Supreme Court, 1978 October Term, 455 U.S. 308 (1978) (involving state sovereignty, the **11TH Amendment** right of the state judiciary to apply the state statute to important state matters, and the issue

of the Federal District Court's "lack of subject matter jurisdiction) was lost by a 5 to 4 decision when Texas Deputy Attorney General Lonny Zwiener gave the wrong answer to Associate Justice Stevens' questioning during oral argument. See my letter to Lonnie Zwiener, dated March 24, 1980. The City of Santa Ana filed an ***Amicus Curiae*** Brief in which it argued that the State of Texas had the right to exclude federal jurisdiction, pending a definitive ruling by the State High Court on the Texas Public Nuisance Statute. During oral argument, Deputy Attorney General Zwiener, without understanding the consequences, innocently volunteered an incorrect statement that the State of Texas did, in fact, employ an interpretation that Justice Stevens felt was flawed. This error at oral argument cost the State the loss of Justice Stevens as a fifth vote, and the High Court's ruling upon the merits of the case, because Zwiener's "concession" during oral argument (which was not a part of the record), in effect, conceded "jurisdiction" and scuttled Santa Ana's ***Amicus Curiae*** argument and claim that the Courts of the State of Texas had not yet ruled definitively on such matters. The State of Texas Petitions had not raised or relied upon the "lack of subject matter" jurisdiction defense, but the Santa Ana ***Amicus*** brief had made it a defense which I was to argue, had Texas been able to arrange time for ***Amicus Curiae*** to argue. The High Court, however, denied Zweiner's motion that he be allowed to split his argument.

After ***Vance***, supra, it became apparent that the "closure" issue would not be ruled upon by the U.S. Supreme Court, absent a second appeal by Santa Ana in one of its later cases (which would have taken years to get the "closure" issue back to the High Court). The City of Santa Ana changed its procedure and started filing a separate action for each new weekly program. This also failed because the Presiding Judge would not give such trials the necessary "priority" and assign a courtroom to try the final injunction issue on a weekly basis. See Status Report to the Santa Ana City Attorney, dated June 23, 1986, at pages 1-6.

Because the High Court would not rule on the "closure" issue and the Santa Ana Superior Court would not assign a Court to try each case weekly on the final injunction, City Attorney Ed Cooper (who had replaced City Attorney Gow) abandoned the courtroom attempt to close down the Theatre by legal action in the courtroom and recommended it be done by eminent domain, incident to a plan of the City to upgrade the area by redevelopment.

In retrospect, it is now apparent that had Assistant Deputy Attorney General Lonny Zweiner argued the "lack of subject matter jurisdiction" in 1982, the ***Vance*** case would have been decided differently and the "closure" issue could have been "forced" upon the U.S. Supreme Court for adjudication in the City's second ***Petition for Writ of Certiorari*** in No. 82-345, which was filed on August 24, 1982.

Today, because of the change in membership of the High Court, and the adoption of a new Court Rule in ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 506 U.S. 139, 121 L.Ed.2d 605, 113 S.Ct. 684 (1993) (which permits the **11TH Amendment** issue of "lack of subject matter jurisdiction" of the Federal District Court to be addressed at the commencement of the lawsuit in a pre-trial interlocutory appeal), the defect in the Santa Ana procedures can now be avoided. All that need be done is to apply for "closure" under the public nuisance abatement statutes and, assuming that the defendants remove that issue to the Federal District Court or that they file a Civil Rights action in the Federal District Court based upon the closure remedy, to immediately take an interlocutory appeal (pursuant to ***Puerto Rico Aqueduct and Sewer Authority***, supra, with respect to the federal interference, and the **11TH Amendment**) on the "closure" issue up to the U.S. Supreme Court.

(Excised Paragraph [suggested remedy]).

(Excised lines [suggested remedy]). My Status Report letters to the Santa Ana City Attorney are sequential, comprehensive, "instructive" and accurately state my position which is as valid now as it was in 1979. ***(Excised lines [suggested remedy])***.

(Excised Paragraphs [2] [suggested remedy]).

Inclusion of both the text of my letters and the synopsis "style" have special purposes. Both provide a different degree of proof, each of which is needed to forestall the customary defensive "red herring" arguments and to maximize the probability that the judgment against the Porn Industry will prevail (buttressed by the use of a fully comprehensive report and autoptical evidence to"authenticate" the "summarized" statements of the law").

The federal court's "lack of subject matter jurisdiction" issue under the **11TH Amendment** which I attempted to get Lonny Zweiner to address as his primary issue, is at the very heart of this solution. No one understands that issue and its sand traps and pitfalls as I do, because of my 25 years of involvement with the **11TH Amendment** issue in the intervening years which have followed the argument in the U.S. Supreme Court in ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969.

In my 1979-1980 letters I suggested that we are really involved in a "moral Dunkirk" of our own making. Support for that "concept" can be found in the November 10, 1999 ***L.A. Times*** news article, a copy of which is attached to this letter at **Exhibit A**, involving the staging of a Pornographic "Trade Show" in 1998 at Cal State Northridge.

I am unwilling to admit that our Judaeo-Christian community standards cannot be "recaptured" and "reinstated".

All that need be done is for enough of the "good" people to do that which is needed to restore what is the absolute "truth" under the Natural Law, and to require that the necessary adjustment be made to the law which, presently, is grossly misinterpreted and misunderstood by our "younger generation".

Supreme Court, U.S.
FILED
FEB 11 2000
CLERK

(4)

No. 99-1041

IN THE SUPREME COURT OF THE UNITED STATES

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney

Petitioners,

-v-

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners, Bill Pryor, Attorney General for the State of Alabama, and Ellen Brooks, Montgomery District Attorney, submit the following brief as their reply to the brief in opposition to the petition for writ of certiorari submitted by respondents Summit Medical Associates, P.C., Beacon Women's Center, New Woman, All Women Health Care, and William H. Knorr, M.D.

I. RESPONDENTS' ARGUMENT UNDERMINES THE PARAMOUNT OBLIGATION TO EXAMINE ARTICLE III JURISDICTION IN ALL CASES

This petition is grounded on the Eleventh Circuit's departure from what this Court has called "perhaps the most important of [the jurisdictional] doctrines." Allen v. Wright, 468 U.S. 737, 751 (1984). That this departure reflects a broad based misapprehension among both courts and practitioners of the inflexible obligation of every federal court in every case to examine its own jurisdiction is evident from the decision below, from the cases cited in the petitioners' original brief, and from respondents' brief. This Court should intervene and underscore the basic and straightforward nature of this error by means of a summary reversal of the decision below.

The respondents take the radically incorrect position that federal courts of appeals do not have an obligation — and in fact are positively forbidden — to independently examine their own Article III jurisdiction in a collateral order appeal. Respondents' Brief in Opposition, p. 6. This position, of course, flatly contradicts this Court's well established precedents to the contrary, all of which stand for the proposition that a court's obligation in this regard attaches in every federal court proceeding and at every stage. See, e.g., Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 547 (1986) (and cases cited therein). The principle is so basic in fact that this Court has on more than one occasion simply assumed its applicability. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S.

(1988); City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

Respondents herein acknowledge that inquiry into a plaintiff's standing is "common in interlocutory appeals specifically authorized by Congress under 28 U.S.C. § 1292." Respondents' Brief in Opposition, p. 6. They fail to explain, however, why a different standard should apply to collateral order appeals, which likewise rest upon a statutory basis. Respondents rely instead upon a misreading of Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995).

Whatever else Swint stands for, the case provides no basis whatsoever for concluding that this Court's unbroken line of pronouncements both pre- and post- Swint, regarding the obligation to examine Article III standing in every case, is to be disregarded in cases involving interlocutory appeals of Eleventh Amendment immunity rulings.

It would be anomalous for the jurisdiction of an appeals court to include the kind of pendent issues that have been deemed subject to review as part of the review of a collateral order, yet not to include whether a "case or controversy" exists under Article III. As this Court said in Swint, it has never been expected that "courts of appeals confine review to the precise decision independently subject to appeal." Swint, 514 U.S. at 50. In fact, the cases cited by this Court in Swint as examples of the kinds of issues which have been deemed properly subject to review on interlocutory appeal demonstrate the fallacy of respondents' position. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 755-757 (1986) (Court of Appeals reviewing District Court's ruling on preliminary injunction request properly reviewed merits as well); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-173 (1974) (Court of Appeals reviewing District Court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); Chicago, R.I. & P.R. Co. v. Stude, 346 U.S. 574, 578 (1954) (Court of Appeals reviewing order granting motion to dismiss properly reviewed order denying opposing

party's motion to remand); Deckert v. Independent Shares Corp., 311 U.S. 282, 287 (1940) (Court of Appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss); Schlagenhauf v. Holder, 379 U.S. 104, 110-11 (1964) (Court of Appeals exercising mandamus power should have reviewed not only whether District Court had authority to order mental and physical examinations of defendant in personal injury case, but also whether there was good cause for the ordered examinations).

This Court's unbroken line of precedents regarding the fundamental, inflexible obligation of federal courts to examine their own jurisdiction has not been modified in the slightest by Swint or any other case. The doctrine remains what it has always been — "perhaps the most important of [the jurisdictional] doctrines." Allen, 486 U.S. at 751. That the Eleventh Circuit disregarded this fundamental prerequisite to its consideration of this case, and did so based primarily on a misreading of Swint, underscores the need for this Court to intervene.

II. A TRUE CONFLICT EXISTS BETWEEN THE DECISION BELOW AND A DECISION OF THE FIFTH CIRCUIT.

Respondents agree that there is a conflict between the decision below and the Fifth Circuit's decision in United States v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999); they argue, however, that the conflict is "illusory" and "a conflict only with dicta." Respondents' Brief in Opposition, p. 8. Respondents further argue that a "true conflict" would be presented if a court of appeals, in a collateral order appeal of an Eleventh Amendment immunity ruling, dismissed a plaintiff's claims for lack of standing "under the belief that it had an independent obligation to assess the plaintiff's standing even if the plaintiff's standing was not 'inextricably intertwined' with the Eleventh Amendment issue." Respondents' Brief in Opposition, p. 8, n.4.

Both of these arguments are without merit. Both arguments amply illustrate the respondents' complete failure to grasp the basic issue involved. To the extent that the respondents' lack of understanding reflects that of the court below, it underscores the need for this Court's intervention.

The Fifth Circuit's consideration of the standing issue in Texas Tech University is hardly "dicta." On the contrary, the Court raised the question sua sponte in recognition of its obligation to do so. U.S. v. Texas Tech University, 171 F.3d at 288, n.12. The Court was mindful, even if the parties were not, that it had a threshold obligation to determine standing. Its holding on that issue, far from being mere obiter dicta, is actually a sine qua non of its decision. Cf. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Respondents' hypothetical case in which a plaintiff's standing would not be inextricably intertwined with the Eleventh Amendment immunity issue is an impossibility. The whole point and burden of this Court's pronouncements on this issue has been that a plaintiff's standing is always inextricably intertwined with every issue in every case. There is no known exception to this inflexible rule for Eleventh Amendment immunity questions brought before the Court in collateral order appeals.

In fact, this Court's recent Order in Pending Case in the matter of Vermont Agency of Natural Resources v. U.S., ex rel. Stevens, 1999 WL 1045146 (U.S.), to be reported at 120 S Ct. 523 , is but the latest indication of the paramount nature of the obligation to examine standing at every stage of a proceeding. Like the present case, Vermont Agency is a collateral order appeal arising out of a district court's denial of defendant's motion to dismiss on the ground of Eleventh Amendment immunity. United States, ex. rel. Stevens v. Vermont Agency Resources, 162 F.3d 195 (2d Cir. 1998). This

Court's directive to the parties to file supplemental briefs addressing the question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?" does little to bolster respondents' position that the issue of standing is not before a court of appeals in a collateral order appeal of an Eleventh Amendment immunity ruling.

CONCLUSION

The Eleventh Circuit's decision in this case amounts to a "demonstrably erroneous application of federal law." Maryland v. Dyson, 527 U.S. 465, 119 S. Ct. 2013, 2014 (1999). This Court should grant the petition and summarily reverse.

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